92-525
No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF CALIFORNIA,
Petitioner,

v.

BRENDA SUE OTTO AND MARVIN ELMER MARK,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

DANIEL E. LUNGREN, Attorney General
of the State of California

GEORGE WILLIAMSON
Chief Assistant Attorney General

RONALD A. BASS
Senior Assistant Attorney General

RONALD E. NIVER
Deputy Attorney General
[Counsel of Record]

GERALD A. ENGLER
Supervising Deputy Attorney General

MORRIS BEATUS
Deputy Attorney General

455 Golden Gate Avenue
Room 6200
San Francisco, California 94102-3658
Telephone: (415) 703-2838
Attorneys for Petitioner

QUESTION PRESENTED

Does Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. §§ 2510-2520) require the suppression in a criminal prosecution of a murder victim's illegal wiretap, which records the defendants' plot to kill him, where the government is an innocent recipient of the evidence?

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BRENDA SUE OTTO AND MARVIN ELMER MARK,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

The petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California, which was entered on July 9, 1992, with rehearing denied on August 20, 1992.

OPINIONS BELOW

The opinion of the California Supreme Court is reported at 2 Cal.4th 1088, 9 Cal.Rptr.2d 596 (1992). A copy of the opinion is attached to this petition as Appendix A. Rehearing was requested and denied. A copy of the order of denial is attached to the petition as Appendix B. The opinion of the California Supreme Court reversed the decision of the Court of Appeal, Sixth Appellate District, which had affirmed the convictions. The state court of appeal's decision is attached to the petition as Appendix C.

JURISDICTION

The California Supreme Court filed its opinion on July 9, 1992. It denied a petition for rehearing on August 20, 1992, at which time the opinion became final and reviewable by this Court. California Rules of Court 24(a) and 27(e). This petition for writ of certiorari followed within 90 days of the date that rehearing was denied. Supreme Court Rules 13.1 and 13.4. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 2515 of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. §§ 2510-2520) provides:

> "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter."

18 U.S.C. § 2518(10)(a) provides:

> "Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that -
>
> "(i) the communication was unlawfully

intercepted;

"(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

"(iii) the interception was not made in conformity with the order of authorization or approval."

STATEMENT OF THE CASE

A. Procedural History

A Santa Clara County jury found respondents, Brenda Sue Otto and Marvin Elmer Mark, guilty of first degree murder on May 3, 1986. The victim was the elderly husband of Brenda Otto. Respondents received sentences of 25 years to life. C.T. 1594-96, 1632, 1635.[1/]

The California Court of Appeal, Sixth Appellate District, affirmed the judgments on January 25, 1991. *People* v. *Otto*, 226 Cal.App.3d 1630, 277 Cal.Rptr. 596, *review granted and opinion superseded*, 808 P.2d 234, 280 Cal.Rptr. 91 (1991).

Respondents successfully petitioned for review to the California Supreme Court, which reversed the convictions on July 9, 1992, on the ground that the trial court erred under federal statutory law by failing to suppress taped telephone conversations which the victim surreptitiously recorded before his death. The tapes evidenced the plot of respondents, the victim's wife and her lover, to commit murder. *People v. Otto*, 2 Cal.4th at 1091-92; 9 Cal.Rptr.2d at 597-98.[2/]

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1. "C.T." refers to the Clerk's Transcript on Appeal.

2. In its opinion the California Supreme Court held that federal law (Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. §§ 2510-2520)) requires suppression of any illegally obtained wiretap in a criminal prosecution. In so holding the Court addressed two issues: (1) does the express

Petitioner's application for rehearing was denied on August 20, 1992. Appendix B.

B. Statement of the Facts

The lengthy facts are summarized in the California Supreme Court's opinion. *People v. Otto,* 2 Cal.4th at 1092-96, 9 Cal.Rptr.2d at 598-601. In essence the victim, Joe Otto, was an elderly and jealous man who married Brenda Otto, a younger woman, whom he suspected of infidelity with her former lover, Marvin Mark. His suspicions proved true, as he learned from two tape recording devices that he used secretly to record his wife's phone conversations. C.T. 77. The first device was a conventional answering machine connected to the kitchen phone. C.T. 131. The second device was a Radio Shack tape recorder with a tape start switch that connected the tape recorder to the telephone line in the victim's daughter's room. C.T. 132-34, 155-58.

Using the latter device, Joe Otto recorded and overheard what appeared to be plot by his wife and her lover to kill him. *People v. Otto*, 2 Cal.4th at 1093-94, 9

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exception to Title III for a home owner listening in over an extension line apply to secret *recording*; and (2) does Title III impliedly except from suppression evidence that the government innocently obtains from a third party wiretapper? In this petition we do not press the first issue, the so-called home extension phone exception. *See People* v. *Otto*, 2 Cal.4th at 1099-1107; 9 Cal.Rptr.2d at 602-08.

Cal.Rptr.2d at 598-99. On the night before he planned to confront his wife about the tapes, he died in his home from several massive blows to the head, probably delivered by means of an elongated blunt instrument. 2 Cal.4th at 1096, 9 Cal.Rptr.2d at 600. The subsequent police investigation led to the recovery of the tape recordings, which formed the "linchpin of the state's case" against respondents. 2 Cal.4th at 1116; 9 Cal.Rptr.2d at 614. It was the evidence of those tapes which respondents unsuccessfully sought to suppress in the trial court, and which the California Supreme Court determined should have been excluded under 18 U.S.C. § 2515, the exclusionary provision of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. §§ 2510-2520) (hereafter Title III or the Act).

REASONS FOR GRANTING THE WRIT

This case presents California's highest court's application of a federal statute in a way that is inconsistent with the reasoning of this Court, conflicts with a United States Court of Appeals, and decides an important question of federal law that this Court should settle, over which there is conflict among United States Courts of Appeals.

In this case, the government innocently obtained illegal wiretap evidence showing that respondents murdered a man. It is undisputed that the use of this evidence in a criminal prosecution implicated no constitutional right. The only bar asserted against its admission at trial was 18 U.S.C § 2515, the exclusionary provision of Title III, a law enacted to regulate or prohibit wiretapping and electronic surveillance.[3/]

Although the exclusionary provision appears absolute on its face, and requires exclusion of illegal wiretap evidence in any trial, hearing or other proceeding

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3. 18 U.S.C. § 2515 provides:

"Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter."

before any court, the decision of this Court and the congressional history of Title III compel the view that the provision was not intended to exclude illegal wiretap evidence in a *criminal* prosecution if the government was not implicated in the illegality.

The Courts of Appeals, however, are in conflict on the underlying principle supporting this view: whether the language of 18 U.S.C. § 2515, which is unambiguous on its face, nonetheless allows the admission of illegally obtained wiretap evidence, where the government was not a participant in the illegality. *Compare United States v. Underhill*, 813 F.2d 105 111-12 (6th Cir. 1987) (phone recordings made in violation of Title III by defendant nonetheless admissible in light of congressional purpose) and *Traficant v. C.I.R.*, 884 F.2d 258, 266 (6th Cir. 1989) (illegal recordings made by defendant's confederates admissible notwithstanding literal meaning of statute), *with United States* v. *Vest*, 813 F.2d 477, 481 (1st Cir. 1987) (exclusionary provision of Title III applied literally to evidence innocently falling into government's hands after a private search and seizure). The California Supreme Court has now entered the conflict on the side of a literal application of 18 U.S.C. § 2515 in a criminal prosecution where the government is innocent of misconduct.

In so doing, the California Supreme Court, and the Court of Appeals in *Vest*, failed to consider this Court's decision that statutory suppression under Title III of government wiretap evidence in a criminal prosecution

is "governed by [18 U.S.C.] § 2518(10)(a)." *United States* v. *Giordano*, 416 U.S. 505, 524 (1974); *United States* v. *Donovan*, 429 U.S. 413, 432 (1977).[4] That provision does not authorize suppression of a private party's illegal wiretap in a criminal prosecution. The congressional history of Title III and the decisions of this Court persuasively show that Congress did not intend Title III's suppression provision to extend the exclusionary rule to a situation in which the government violated neither the Fourth Amendment nor any material statutory requirement of Title III.

This is apparent from *United States v. Giordano*, in which this Court, in the context of a government wiretap order that failed to conform to Title III's statutory scheme, concluded that suppression of *government* wiretap evidence was required if the evidence was "unlawfully intercepted" within the meaning of section 2518(10)(a)(1), the remedial provision of the statute that prescribes the

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4. 18 U.S.C. § 2518(10)(a) provides:

"Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that -

"(i) the communication was unlawfully intercepted;

"(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

"(iii) the interception was not made in conformity with the order of authorization or approval."

procedures by which the government may obtain an intercept order to secure wiretap evidence.[5/] A suppression-triggering "unlawful intercept" occurs when the *government* either violates the Constitution or fails to "satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." 416 U.S. at 527.

Section 2518(10)(a) is the express statutory suppression remedy for government intercept violations. It "'limits'" § 2515. 416 U.S. at 529, n. 17, quoting from S. Rep. No. 1097, 90th Cong., 2d Sess. (1968) at 2195. Because private parties do not secure intercept orders, the statute is irrelevant to private wiretapping. Section 2518(10)(a) by its terms therefore cannot "trigger" suppression of government wiretap evidence in a criminal case where a private party illegally obtained the evidence. Only the government's violation of the Constitution or its failure to comply with a material, nonconstitutional provision of Title III implicates § 2518(10)(a), which in turn governs whether government evidence will be suppressed under § 2515. *See Giordano* at 525-27.

The California Supreme Court failed to address the implications of *Giordano* and the unavoidable

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5. The suppression circumstances of 18 U.S.C. § 2518(10)(a)(ii) or (iii) are not in issue here.

conclusion that suppression under § 2515 has no application to wiretap evidence that the government offers in a criminal prosecution if the disclosure of the evidence did not result from the government's unlawful interception. This failure also infects the First Circuit's decision in *United States v. Vest*, 813 F.2d 477, leading to an analytical straight jacket which prevented that Court of Appeals from recognizing that the "plain" language of § 2515, when read in light of § 2518(10)(a), does not plainly require suppression of government evidence that the government did not unlawfully intercept. The effect is recurring inconsistency in the application of a federal statute, and confusion.

The vice of the opinion of California's highest court is that it compounds this confusion both by its failure to address *Giordano* and by its erroneous assumption that because Congress intended Title III to apply to unlawful private intercepts, Congress also intended suppression of a private wiretap in a criminal case. It does not follow, however, that private violations, which support suppression in private litigation, also permit suppression in a criminal prosecution where the government is the innocent recipient of the evidence. Congress was aware of the problem of private wiretapping and provided for suppression of wiretap evidence in civil and administrative proceedings, as well as civil and criminal sanctions against the wiretapper and those using its fruit. *Cf. Gelbard v. United States*, 408 U.S. 41, 80

(Rehnquist, J., dissenting) (1972). As we explain below, Congress was also aware of the scope of the Fourth Amendment exclusionary rule in criminal cases, and expressly disclaimed any intent to expand the rule through statutory suppression under § 2515.

As to this congressional intent, the California Supreme Court's opinion on this federal issue, unless corrected, will mislead other courts looking to California for guidance, for the opinion is indefensibly at odds with guiding federal principles. Courts are obligated to pursue the purpose of a congressional statute, regardless of its literal language, and avoid absurd or unreasonable results "'plainly at variance with the policy of the legislation as whole.'" (*United States* v. *American Trucking Assns.*, 310 U.S. 534, 543-44 (1940). Accordingly, it is the intention of Congress that controls application of a statute and a result contrary to the literal interpretation of the words is justified when "literal application" produces a result "demonstrably at odds with the intention of its drafters." *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982).

Significantly, the California Supreme Court's opinion barely mentions Congress' explicit declaration of intent not to expand the scope of the exclusionary rule in enacting Title III. It is a fatal analytical oversight because Title III's interest in privacy must be balanced against that intent. The principle source of congressional history is Senate Report No. 1097. *See United States v. Giordano*,

416 U.S. at 528. The Senate Report explains that Congress included a provision for suppression (§ 2515) that "largely reflects existing law. It applies to suppress evidence directly [citation] or indirectly obtained in violation of the chapter. [Citation.] There is, however, no intention to change the attenuation rule. [Citation.] *Nor generally to press the scope of the suppression rule beyond present search and seizure law.* See *Walder* v. *United States* (1954) 74 S.Ct. 354, 347 U.S. 62." S. Rep. No. 1097 at 2185 (emphasis added).

Fairly balanced, the stated objective of Title III *not* to press the scope of the suppression rule beyond its existing borders weighs far heavier than the theoretical invasion of privacy that results from additional publication of an intercepted, already-disclosed, criminal communication. Here, the state supreme court voided two murder convictions under the presumed compulsion of a federal statute and its view of Congress' intent. The state court concluded that federal law required it to strike a balance on behalf of two killers whose privacy right to plot murder it considered an interest that Congress meant to protect. Congress would be astonished and appalled to hear that.

Congress' declared intent not to press the scope of the suppression rule beyond existing law has meaning for the question presented here, given the Senate Report's citation to *United States v. Walder*, 347 U.S. 62 (1954), in which the government was allowed to use unlawfully

obtained evidence for impeachment at trial. The California Supreme Court is entirely silent on the significance of Congress' expressed intent to limit the scope of statutory suppression, even in the face of privacy violations.

The California Supreme Court has also failed to heed this Court's caution against using "general reference to the statute's expressed concern for the protection of individual privacy" to resolve the tension between the various stated objectives of Title III. *United States* v. *Kahn*, 415 U.S. 143, 151 (1974). The California Supreme Court failed to appreciate that the admission of innocently received wiretap evidence in a criminal prosecution *on balance* does no harm to the privacy interests protected by Title III, which continues to extend reasonable protection against illegal private and governmental wiretapping. It is true that use of an illegal wiretap at trial, even if the government was an innocent recipient of the evidence, is a renewed publication and theoretical violation of the defendant's privacy interest. It does not follow, however, that Congress intended Title III's obvious purpose to protect privacy to be absolute and produce results that are at best counter-intuitive and at worst absurd. Congress intended to strike a balance.

The California Supreme Court justified its failure to strike a correct balance, or to distinguish between private and governmental wiretapping, by a misapplication of this Court's general concern about courts becoming

partners to illegal conduct. *People v. Otto*, 2 Cal.4th at 1109; 9 Cal.Rptr.2d at 609, citing *Gelbard* v. *United States*, 408 U.S. at 50. As this Court explained, that concern does not justify a blanket or inflexible rule requiring suppression for all illegally obtained evidence. "'Illegal conduct' is hardly sanctioned, nor are the foundations of the Republic imperilled, by declining to make an unprecedented extension of the exclusionary rule. . . where the rule's objectives would not be effectively served and where other important and historic values would be unduly prejudiced." *United States v. Calandra*, 414 U.S. 338, 355 n. 11 (1974).

Finally, even the California Supreme Court's conclusion that the statutory suppression provision of Title III is unambiguous on its face and allows no exception for admitting illegally obtained wiretaps is in contradiction with its own recognition that federal courts have refused to suppress illegal wiretap evidence if it would contravene the clear congressional purpose of Title III. *People v. Otto*, 2 Cal.4th at 1114; 9 Cal.Rptr.2d at 613.

The federal courts admit evidence of illegally obtained wiretaps under a number of implied exceptions, for example when the illegal tapes are used for impeachment, *United States* v. *Echarvarria-Olarte,* 904 F.2d 1391, 1397 (9th Cir. 1990); *United States v. Grubbs*, 776 F.2d 1281, 1286 (5th Cir. 1985); *United States v. Winter,* 663 F.2d 1120, 1154 (1st Cir. 1981); *United States* v. *Caron*, 474 F.2d 506, 509-10 (5th Cir. 1973); when the

defendant himself or a coconspirator committed the illegal intercept, *United States* v. *Underhill*, 813 F.2d at 111-12; *Traficant v. C.I.R.*, 884 F.2d at 266; *United States* v. *Nietupski*, 731 F.Supp. 881, 883-86 (C.D. Ill. 1990), *but see United States v. Vest*, 813 F.2d 477; *United States v. Phillips,* 540 F.2d 319, 327 n. 5 (8th Cir. 1976), *cert. denied* 429 U.S. 1000 (1976); when the tapes are evidence of an illegal wiretap and are used in the prosecution of the wiretapper, *United States* v. *Liddy*, 354 F.Supp 217, 221 (D.D.C. 1973), citing S. Rep. No. 1097 at 2188; and when a foreign government is responsible for the illegal wiretap, *United States* v. *LaChapelle,* 869 F.2d 488, 489-90 (9th Cir. 1989). Even this Court has permitted the use of wiretap evidence obtained in technical violation of Title III where congressional history showed that it was not Congress' intent to suppress the evidence if the violation was not significant within the statutory scheme. *See, United States* v. *Donovan* 429 U.S. 413, 435-37 & n. 25 (1977); *United States* v. *Chavez* 416 U.S. 562, 574-75 (1974). The issue is not whether exceptions exist -- they undeniably do -- but whether one also exists here, in light of express congressional intent not to press the scope of suppression beyond existing search and seizure law, if the *government* did not violate any of the provisions of Title III.

Where suppression is not compelled by the Constitution, where suppression is not consistent with Congress' expressed intent, where suppression is not authorized by the only statute (§ 2518(10)(a)) expressly

applicable to government use of illegal wiretaps, where suppression denies the interests of a civilized society in punishing criminal wrongdoing and protecting itself from the public enemy, and where suppression simply offends our most basic notion of justice, then evidence should not be suppressed. Congress could have intended nothing different.

The California Supreme Court fundamentally misapprehended federal law, and under the authority of its misapprehension it has suppressed the most probative evidence of murder. Its decision beckons other courts, which confront this recurring issue, to the same pernicious result. It is a result that leads to injustice, and in this particular case, to the triumph of two murderers. It is a result that cannot be reconciled with the intent of Congress or the decisions of various Courts of Appeals. The result must be corrected, and this important issue of federal law must be definitively settled.

CONCLUSION

For the foregoing reasons, we respectfully request that the Petition for Writ of Certiorari to the Supreme Court of the State of California be granted.

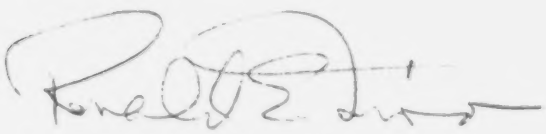
DATED: September 22, 1992

DANIEL E. LUNGREN, Attorney General
of the State of California

GEORGE WILLIAMSON
Chief Assistant Attorney General

RONALD A. BASS
Senior Assistant Attorney General

RONALD E. NIVER
Deputy Attorney General
[Counsel of Record]



GERALD ENGLER
Supervising Deputy Attorney General

MORRIS BEATUS
Deputy Attorney General

Attorneys for Petitioner

APPENDIX A

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE

Plaintiff and Respondent,	S019773
v.	Ct.App. No. H004612
BRENDA SUE OTTO et al.,	
Defendant and Appellant.	Santa Clara County Super.Ct.1145372

_____/

Joe Otto's distrust of his younger wife, Brenda Sue, bordered on the obsessive; his anxieties derived mainly from her uncertain relationship with another man, Marvin Elmer Mark. To confirm his suspicions, Joe secretly tape-recorded Brenda's telephone calls from the family residence. These recordings captured a conversation between Brenda and her suspected paramour which added a new and horrifying dimension to Joe's fears; the illicit alliance was a reality, but its object was not merely his wealth and marriage, it was his life itself.

Joe's concerns proved to be well founded. Within 48 hours of the recorded conversation, he was found dead -- bludgeoned to death in his own home. Shortly thereafter the police discovered the secret recording and several other taped conversations. Brenda and Marvin Mark were charged and tried for first degree

murder. A jury returned guilty verdicts against both defendants; each received a prison sentence of 25 years to life.

Prior to trial, both defendants moved to suppress the taped conversations on the grounds that Joe Otto had obtained them in violation of Title III of the Omnibus Crime Control and Safe Street Acts of 1968 (18 U.S.C. §§ 2510-2520) (hereafter Title III or the Act) and that their introduction into evidence would therefore violate the exclusionary provision of the Act (18 U.S.C. § 2515). The trial court denied the pretrial motion and subsequently denied a renewed motion to suppress the tapes at the start of trial. The Court of Appeal affirmed the trial court's rulings, holding that suppression was not compelled under federal or state law. 1/

We granted review limited to the issue of the admissibility of the telephone conversations secretly

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1. Although defendants relied exclusively on federal law at trial, the Court of Appeal also considered defendants' state law claims based on the California Privacy Act (Pen. Code, §§ 631, 632). State law, however, cannot be less protective than the federal Act. (United States v. McKinnon (1st Cir. 1983) 721 F.2d 19, 21, fn. 1.) Because we conclude that suppression is compelled under Title III, we need not address the issues raised by the parties concerning California law.

recorded by the victim. [2/] For the reasons set forth below, we conclude that under Title III the contents of the tapes could not properly be introduced into evidence. Because of the critical role played by the tapes at trial, we further conclude that the error requires reversal of the judgments of conviction.

FACTS

Joe Otto was a 61-year-old electrician with a history of heart disease when, in September of 1986, he married Brenda Sue Delwiche, a 39-year-old divorced woman with two grown children. Brenda was Joe's third wife.

The couple's relationship was troubled from the start. Their courtship of the previous year and brief marriage were marked by jealousy and suspiciousness on Joe's part, and cold-blooded calculation on the part of Brenda. She confided to a friend that she agreed to the marriage only because Joe was sick and probably would not live long; the marriage would provide financial security for herself and her daughters. Indeed, before she would agree to marry Joe, Brenda had apparently demanded a substantial cash payment, which she planned to invest with Marvin Mark.

Mark's involvement with Brenda dated from

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2. We subsequently solicited and received supplemental briefing on the question of prejudicial error.

August 1985, when he became a boarder in her home. He soon became her lover and they were engaged in late 1985. The marriage plans were dropped, however, because of financial problems. Mark was an enrolled agent licensed to do income tax work. He shared an office with another enrolled agent in Santa Clara and did overload work in lieu of rent. Throughout the period in question, he complained of money problems.

In early September 1986, Joe gave Brenda a check for $10,000. The check was immediately funneled to Mark, who thereupon spent the money on a new office in Campbell and paid off certain debts. Shortly thereafter, Joe and Brenda were married in Hawaii. Within days of their return, Brenda began to speak of obtaining a divorce. She complained of Joe's possessiveness and jealously. By the middle of October, she told her daughter that one way or another -- by death or divorce -- the marriage would end and she might then marry Mark.

About a week after they returned from Hawaii, Brenda learned that Joe was using a telephone answering machine to record her conversations. Indeed, even before they were married, Joe had frequently recorded his telephone conversations with Brenda so that, as he explained to his daughter Jolynn, he could later review and analyze them for contradictions. A friend showed Brenda how to unplug the answering machine from the telephone line. Unbeknownst to Brenda, however, the

secret taping continued from a voice-activated recorder which Joe had hidden under Jolynn's bed. The machine recorded every call that came in or out of the house.

On the afternoon of Monday, October 13, 1986, Joe approached his neighbor, Scott Kennedy, a San Jose police officer, and asked him to listen to a particular tape. The tape contained the whispering voices of a man and a woman whom Joe identified as Brenda and Mark. The so-called "whispering tape," which was played for the jury at trial, begins with Brenda asking, "Why?" and a male voice responding, "Everything was wrong." The male then refers to a "party across the street," to "stuff all over the street with the sheets on" which "must have somebody watching," and to an "accident" on the corner. Brenda then explains, "It's the garage sale." The male states, "I tried every possible way," and asks where Brenda is calling from. When she says "home" the male expresses concern but Brenda reassures him, "I learned how to unplug it." Later in the conversation the male states, "I got a better plan." Throughout the call, the male refers to Brenda as "honey" and closes with, "Love you baby." [3/]

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3. A transcription of the entire conversation, which was introduced at trial, reads as follows: "M - Hello. ¶ F - Mark . . . [¶] M - Yea. [¶] F - Why? ¶ M - What happened? [¶] F - How come? ¶ M - Everything was wrong . . . the party across the street . . . Inaudible . . . (possible . . . Drove up and down a couple of times.) Stuff all over the street with the sheets on . . . uh, you know made the lights brighter. I said, 'What the hell's

The various references in the tape place the time of the telephone call at late Saturday night, October 11, when a neighborhood party was occurring; items from a garage sale that Joe and Brenda held that day were still outside covered with sheets; and an accident which occurred at 11:10 p.m. that evening was not cleared until midnight.

After he talked to Kennedy on Monday, Joe also played the tape for his daughter Jolynn, who lived with Joe and Brenda and worked the night shift as a psychiatric

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goin' on, people gonna leave that out there and must have somebody watching or something, I couldn't figure it out.' [¶] F - It's the garage sale. [¶] M - Huh? [¶] F - It's the garage sale. [¶] M - I know it's the garage sale. But I couldn't figure a guy leaving it out there and not having somebody watching it . . . you know. [¶] F - No. [¶] M - I tried every way possible. Where you at? [¶] F - Home. [¶] M - Oh no, you're calling from the house. [¶] F - Yea. I learned how to unplug it . . . [¶] M - Huh? [¶] F - I learned how to unplug it. [¶] M - Oh, you did. Okay, we got to talk, honey. Can you get to me sometime later? [¶] F - Yes. [¶] M - I'll be home. I'll stay home all day. You just get a hold of me, okay? I got a better plan. I'm sorry, honey. Just . . . you know . . . there was no way. Was the accident still on the corner when you guys got home? Huh? [¶] F - No. [¶] M - Was it later? What time did you get home? [¶] F - About ten to twelve. [¶] M - It just happened over there so (inaudible). Well, do whatever you have to do to get a hold of me. [¶] F - Okay. [¶] M - Okay. [¶] F - Okay. [¶] M - Okay. Love you baby. [¶] F - Alright. [¶] M - Bye, bye."

technician at a state hospital. They tried to understand what the conversation meant. Joe told her that it was made Saturday night after he had gone to bed. Jolynn informed her father that she found the door unlocked on Sunday morning when she returned from work; Joe recalled that he had locked the door before going to bed. Concerned about the call, Jolynn asked her father to keep his gun nearby. Joe took her advice, retrieved his gun from a hiding place in the kitchen and placed it in his jacket pocket.

More telephone conversations were recorded the next day, Tuesday, October 14, although it is unclear whether Joe ever heard them. One involved a call from Brenda to Mark. In it Mark asked whether Jolynn was going to work that night; Brenda assured him that she was. Mark then states that he had "picked up a set of wheels to try out and see what it looks like. Trade cars, whatever." Mark indicated that he would be at the office until 7 p.m. and would be at home until "about 9:30 or so. Any changes, let me know." The conversation ended with each expressing love for the other. [4/]

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4. The reference on the tape to Mark having "picked up a set of wheels" was given significance by the testimony of a car salesman. Mark had done some bookkeeping for the dealership. The salesman recalled that Mark had borrowed a car from the dealer around Tuesday, October 14, 1986. At the time, Mark already owned two cars in working order.

Late that afternoon, Joe and Jolynn left the house for an appointment. Before leaving, Joe handed his daughter an envelope containing his will and asked her to put it in a safe place. The will left Jolynn all of Joe's property and gave Brenda one dollar.[5/] One their way home, Jolynn told her father that Brenda had been asking about her work schedule. To prevent anything from happening to Joe, they concocted a plan to have Jolynn tell Brenda that she planned to return home early from work that night. Joe also promised that he would confront Brenda the next day, Wednesday. Although when they left the house the doors were locked and the dog was in the yard, when they returned, at 6:45 p.m., they found the doors wide open and the dog running loose in the house.

Alarmed, Joe checked the house with his gun but found nothing. Later, Jolynn mentioned to Brenda that she intended to leave work early that evening. Brenda appeared visibly upset by the news. Jolynn left the house at 7:30 p.m. She did not return home early. When she finally did, her father was dead.

Joe's death was discovered early the next morning, Wednesday, when Brenda appeared at the doorstep of the Ottos' neighbor, Scott Kennedy. When Kennedy let her in, she was naked and screaming that "you have to help Joe. I think they have killed him or

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5. Joe's total estate amounted to $300,000.

he's hurt. Somebody has broken in." Brenda's hands were tied behind her back with a terrycloth belt. Kennedy's wife, Kim, untied her bindings and wrapped Brenda in a blanket; she did not observe any blood or marks on Brenda's hands or arms, other than what appeared to be a rug burn on her right forearm. Both Kennedys detected the odor of semen.

Brenda explained that she and Joe had fallen asleep while watching television. She awoke with the feeling of "stuff" on her face and the presence of two people hurting Joe. In recounting this tale, Brenda seemed upset but was not crying. The first police officer on the scene obtained a report from Brenda that two Latino men had broken into the home and possibly killed Joe. In a second statement, also at the Kennedy house, Brenda stated that a large Latino man had come out of nowhere and stood next to Joe. She then heard a loud noise and simultaneously felt something sprayed on her face. She tried to run but the intruder struck her on the side of her face. A second man grabbed her housecoat, ripped off her bra, and knocked her into a wrought iron fixture, following which she passed out. She regained consciousness to find her hands tied behind her back and her ankles bound with pantyhose. She eventually untied her feet and went to the Kennedy house.

The officers who entered the Otto residence found Joe dead on the floor of the family room. The lights and television were off. An afghan partially covered

the body. The autopsy disclosed that Joe had died of "massive" head injuries from a "forceful trauma." The pathologist attributed the injuries to three to five blows to the head. The injuries were consistent with the use of an elongated, blunt instrument, such as a bat, two-by-four or jack handle. There was no evidence of "defensive wounds."

Once Kennedy informed the police of his conversation with Joe and the existence of the "whispering tape," the investigation focused on Brenda. A taped interview was conducted, two parts of which were played to the jury. In the first part, Brenda is tearful and describes her marriage as "good," "not a bad relationship." In the second part, the interrogating officer informs Brenda about the whispering tape and asks her whether she had ever discussed killing Joe on the phone. After a long pause, Brenda responds, "No -- I don't think so." Pressed further, Brenda denied the existence of such a discussion. She was arrested that morning. A medical examination revealed no injuries to her face and no evidence that she had been struck. Particles like dried flowers were found on her chest, back and pubic area; these were consistent with dried flowers found on the floor of the murder scene.

The investigation next focused on Mark. In a taped statement he acknowledged that he and Brenda had been lovers, but stated that they had not had sex since September. He claimed that his last telephone

conversation with Brenda was Sunday or Monday, when they talked about the deposit on the house they had shared. He stated that he was at his office all day Tuesday until 8:00 p.m., returned home by 8:45, and worked at home until about midnight; he then took his dog out in his pickup for a run, returning about 1:00 a.m. He saw and heard no one. Confronted with the "whispering" conversation, he conceded that it had occurred but could not recall what it was about.

The crime scene investigator noted a number of anomalies. He found no evidence of forced entry into the house, no drawers pulled open, clothes strewn about, mattresses moved or jewelry missing. The victim still had money on him. An expert in blood splatter analysis noted that it was peculiar that Brenda's pantyhose, robe and bra were found with bloodstains all around them, but none underneath. He also observed that the pattern of blood splatters was inconsistent with Brenda's account of the attack.

Neither Brenda nor Mark testified at trial.

DISCUSSION

1. Title III - Background

As noted earlier, defendants moved unsuccessfully to suppress the tapes as having been made in violation of Title III. The trial court denied the

motion, and the Court of Appeal affirmed the trial court's ruling.

Title III provides a "comprehensive scheme for the regulation of wiretapping and electronic surveillance." (Gelbard v. United States (1972) 408 U.S. 41, 46.)[6/] The Act makes it unlawful for any person to intercept or endeavor to intercept any wire, oral, or electronic communication "[e]xcept as otherwise specifically" permitted by other provisions of the statute. (18 U.S.C. § 2511(1)(a).) Willful disclosure of the contents of communications by a person who knows or has reason to know that the information was obtained through an unlawful interception is also forbidden. (18 U.S.C. § 2511(1)(c).)

The exceptions to Title III's blanket proscription against electronic wiretapping and surveillance are contained in 18 United States Code section 2511(2). Subdivision (d) of that section provides that it shall not be unlawful for a person to intercept a communication where "such person is a party to the communication or where

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6. Like the high court, we occasionally use the general terms "wiretapping" and "electronic surveillance" interchangeably to refer generally to conduct prohibited by the Act. We also use the phrases "domestic" or "spousal" wiretapping with the understanding that the phraseology is imperfect; as here, the target of the snooping usually involves parties other than family members. (See Kratz v. Kratz (E.D. Pa. 1979) 477 F.Supp. 463, 468, fn. 10.)

one of the parties to the communication has given prior consent to such interception . . . ." In other words, the Act prohibits third party nonconsensual intercepts; one party may record a conversation without the knowledge or consent of the other, or may authorize another to do so. However, other than duly authorized law enforcement officers, third parties may not engage in nonconsensual surreptitious wiretapping except under extremely limited circumstances not applicable here. (18 U.S.C. § 2511(2).)

The enumerated exceptions define the only circumstances in which surreptitious electronic surveillance is permissible under the Act. "Unless there is a specific section of the statute which excepts a particular interception, all willful interceptions of wire and oral communications are prohibited by the Act." (United States v. Underhill (6th Cir. 1987) 813 F.2d 105, 107; see also United States v. Giordano (1974) 416 U.S. 505, 514 ["The purpose of the [Act] . . . was effectively to prohibit, on the pain of criminal and civil penalties, all interceptions of oral and wire communications, except those specifically provided for in the Act . . . ."].)

In addition to imposing a criminal penalty for unauthorized interceptions or disclosure of information obtained through such interceptions (18 U.S.C. § 2511(1)(a)), the Act creates a damage remedy for any person whose wire or oral communications have been unlawfully intercepted, disclosed or used. (18 U.S.C. § 2520.) More importantly for our purposes here, the Act

also provides a suppression sanction. Title 18 United States Code section 2515 (hereafter section 2515) states: "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter."

Thus, a violation of the federal statute renders the illegally obtained evidence inadmissible in state court proceedings. (State v. Politte (Ariz.Ct.App. 1982) 664 P.2d 661, 670.) The Act, in effect, establishes minimum standards for the admissibility of evidence procured through electronic surveillance; state law cannot be less protective of privacy than the federal Act. (United States v. McKinnon, supra, 721 F.2d at p. 21, fn. 1; Pulawski v. Blais (R.I. 1986) 506 A.2d 76, 77.)

The Act also provides the means for invoking the suppression sanction. "Any aggrieved person in any trial, hearing, or proceeding in or before any court . . . of the United States, a State or a political subdivision thereof, may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that -- [¶] (i) the communication was unlawfully intercepted . . . ."

(18 U.S.C. § 2518(10(a).) The Act defines an "aggrieved person" as one "who was a party to any intercepted wire, oral or electronic communication or a person against whom the interception was directed." (18 U.S.C. § 2510(11).)

As parties to the taped conversations, both defendants here clearly meet the statutory definition of "aggrieved person." Therefore, defendants had standing to move for suppression pursuant to 18 United States Code section 2518(10).

Furthermore, it is well settled that a telephone conversation is a "wire communication" within the meaning of Title III (United States v. Axselle (10th Cir. 1979) 604 F.2d 1330, 1334; United States v. Harpel (10th Cir. 1974) 604 F.2d 1330, 1334) and that the tape recording of such conversations constitutes an "intercept" under the Act. (United States v. Turk (5th Cir. 1976) 526 F.2d 654; 18 U.S.C. § 2510(4).)[7/] It is also undisputed that none of the

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7. It is noteworthy that Title III draws a distinction between "oral" and "wire" communications. The latter contains no requirement that the communication be made under circumstances justifying an expectation of privacy. (18 U.S.C. § 2510(1).) An "oral" communication, on the other hand, is expressly defined as a communication "uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation . . . ." (18 U.S.C. § 2510(2); see Matter of John Doe Trader Number One (7th Cir. 1990) 894 F.2d 240, 242-243.) Thus, a telephone call which is

recordings at issue here was obtained by duly authorized law enforcement officers, and that neither defendant was aware of or consented to the recordings. Accordingly, the tapes do not fall within any of enumerated exceptions to the Act's broad proscription against interceptions of wire communications.

A plain reading of the Act, therefore, leads to the inescapable conclusion that defendants' conversations were unlawfully recorded, and should not have been received in evidence under the strict injunction of Title III (18 U.S.C. §§ 2515, 2518.)

The Attorney General nevertheless asserts that the conversations were properly admitted under two separate theories: (1) that they were lawfully intercepted under an implied exception to Title III for "interspousal" or "domestic" wiretapping; and (2) that even assuming they were unlawfully obtained, Title III does not compel

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intercepted by means of an illegal wiretap "is protected by Title III regardless of whether the participants actually have any justifiable expectations of privacy." (Fishman, The Interception of Communications Without a Court Order: Title III, Consent, and the Expectation of Privacy (1976) 51 St.Johns L.Rev. 41, 61; see Kratz v. Kratz, supra, 477 F.Supp. at pp. 472-473; cf. People v. Siripongs (1988) 45 Cal.3d 548, 564 [defendant whose telephone conversation was overheard by police officer standing within three feet of defendant "could not have justifiably expected his conversation was not being intercepted, because he could clearly see that at least one police officer could hear every word he said."].)

suppression where the government is merely the innocent recipient, rather than the procurer, of the illegally intercepted communication. We address each of these contentions in turn.

2. Interspousal Wiretapping

The Attorney General's threshold contention is that the defendants' conversations were lawfully recorded by the victim under an implied exception to Title III's comprehensive ban on surreptitious wiretapping. In essence, the government contends that Title III does not prohibit a family member from wiretapping a family phone. Because the wiretap here was directed at one spouse by another and was accomplished within the marital home, the Attorney General contends that it was not unlawful and, therefore, that suppression was not required under section 2515.

The Attorney General's claim runs counter to the plain language of the Act, which states that "any person" who engages in electronic surveillance is liable to punishment or subject to suit "except as otherwise specifically provided." (18 U.S.C. § 2511(1).) No exception is specifically provided for family members or for interspousal or "domestic" wiretaps. Thus, the government essentially asks this court to create a new, unenumerated exception to the Act for interspousal wiretapping.

That request cannot be squared with the

Supreme Court's pronouncement that, "Except as expressly authorized in Title III, . . . all interceptions of wire and oral communications are flatly prohibited." (Gelbard v. United States, supra, 408 U.S. at p. 46, italics added.) As the high court has explained, "The purpose of the [Act] . . . was effectively to prohibit . . . all interceptions of oral and wire communications except those specifically provided for in the Act . . . ." (United States v. Giordano, supra, 416 U.S. at p. 514, italics added; see also United States v. Underhill, supra, 813 F.2d at p. 107 ["Unless there is a specific section of the statute which excepts a particular interception, all willful interceptions of wire and oral communications are prohibited by the Act."].)

The plain language and the high court's pronouncements notwithstanding, the Attorney General contends that the legislative history of Title III reveals a congressional intent to exempt domestic wiretapping from the Act's comprehensive ban on nonconsensual electronic surveillance. This argument overlooks the settled rule that courts will not refer to extrinsic sources when a statute is clear and unambiguous on its face. (See Caminetti v. United States (1917) 242 U.S. 470, 485 ["Where the language is plain, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion."]; accord Gemsco v. Walling (1945) 324 U.S. 244, 260; United States v. Oregon (1961) 366 U.S. 643, 648.) Accordingly, no further analysis is necessary to determine that the surreptitious, third party wiretap

perpetrated here was unlawful under Title III.

Even if we look behind the text of the Act, as the government urges, our conclusion remains unaltered. Indeed, contrary to the claims of the Attorney General, the history of Title III reveals an unmistakable congressional intent to prohibit all unauthorized electronic surveillance, including domestic wiretapping.

Congress enacted Title III after extensive legislative hearings had disclosed widespread abuse of electronic surveillance. (See Comment (1977) 27 Buffalo L.Rev. 139, 140, fn. 5.) These abuses were not solely or even primarily occurring in the public sphere, but rather the private domain, particularly in the areas of domestic relations and commercial espionage. Appearing before the Senate Judiciary committee, Professor Robert Blakey, widely credited as the author of Title III (see United States v. Giordano, supra, 416 U.S. at pp. 517-518, fn. 7), testified as follows: "[P]rivate bugging in this country can be divided into two broad categories, commercial espionage and marital litigation." (Hearings on the Right to Privacy Act of 1967 Before the Subcommittee on Administrative Practice & Procedure of the Senate Judiciary Committee, 90th Cong., 1st Sess., pt. II at p. 413, quoted in United States v. Jones (6th Cir. 1976) 542 F.2d 661, 669; see also Comment, supra, 27 Buffalo L.Rev. at p. 142, fn. 18.)

Numerous statements by other witnesses and legislators during the Senate hearings demonstrate that

Congress was keenly aware of the problem of interspousal surveillance. (See Comment, supra, 27 Buffalo L.Rev. at p. 142-143; see also Note, (1978) 12 Val. U.L.Rev. 537, 541-542; Comment (1975) 7 U. Tol. L.Rev. 185, 201-205.) As one federal court has observed: "The legislative history [of Title III] abounds with expressions of congressional consensus on the lack of justification for private electronic surveillance, . . ." particularly in the domestic context. (United States v. Jones, supra, 542 F.2d at p. 671, fn. 19.)[8/]

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8. Congress held a number of hearings beginning in 1965 as part of an ongoing legislative effort to revise federal law on electronic surveillance. This process culminated in the enactment of Title III of the Omnibus Crime Control and Safe Streets Act of 1968. (A list of the congressional hearings can be found in Comment, supra, 27 Buffalo L.Rev. at p. 140, fn. 5.)

During the hearings, Senator Long, Chairman of the Subcommittee on Administrative Practice & Procedure of the Senate Judiciary Committee, noted that the three major areas in which private electronic surveillance was widespread were "(1) industrial (2) divorce cases, and (3) politics. So far, we have heard no real justification for continuance of snooping in these three areas." (Hearings on Invasion of Privacy Before the Subcommittee on Administrative Practice & Procedure of the Senate Judiciary Committee, 89th Cong., 1st Sess., pt. 5 at p. 2261 (1965-1966), quoted in United States v. Jones, supra, 542 F.2d at p. 668, fn. 12; see also Kratz v. Kratz, supra, 477 F.Supp. at p. 471.) The subcommittee also heard testimony from the District Attorney of Dade County, Florida, indicating

The Senate committee report that accompanied Title III explicitly identified the problem which the legislation was designed to address as the increasingly widespread private surveillance into "each man's personal, marital, religious, political, or commercial concerns. . . ." (Sen. Rep. No. 1097, 90th Cong., 2d Sess. 225, reprinted in 1968 U.S. Code Cong. & Admin. News 2117, 2154, italics added.) Such abuses, the report continued, could no longer be condoned. "Virtually all concede that the use of wiretapping or electronic surveillance techniques by private unauthorized hands has little justification where communications are intercepted without the consent of one of the participants." (Id. at p. 2156, italics added.) Indeed, a cosponsor of the Act, Senator Hruska, stated that the Act imposes a "broad prohibition . . . on private use of electronic surveillance, particularly in domestic relations and industrial espionage situations." (Id. at p.

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that domestic wiretapping was routine procedure in marital disagreements (Hearings, supra, pt. II, at p. 1009), as well as the testimony of several private investigators indicating that electronic surveillance was a common technique in domestic relations investigations. (Id., pt. 5, at p. 2262, 2365, 2411, cited in United States v. Jones, supra, 542 F.2d at p. 668, fn. 12; Kratz v. Kratz, supra, 477 F. Supp. at p. 471.) For other passages from the legislative record illustrating a congressional awareness of the problem of domestic wiretapping, see United States v. Jones, supra, 542 F.2d at pages 668-669, footnotes 12, 14, 15, and 16.

2274, italics added.)

Thus, there can be no doubt that Congress was fully aware of the prevalence of domestic wiretapping, and intended to prohibit the practice by virtue of the Act's comprehensive ban on nonconsensual electronic surveillance.[9/] The legal writers who have examined the congressional record are nearly unanimous on this point. As one author observes: "Although Congress made certain specific exclusions from liability under the statutes, it did not specifically exclude spouses. The legislative history leaves no doubt that Title III was designed to prohibit private unauthorized electronic surveillance, and that Congress was aware that a major area for use of such surveillance was the preparation of domestic relations litigation." (Note (1979) 12 Creighton L.Rev. 1209, 1227.)

Another legal commentator has concluded: "Congress intended that [interspousal surveillance] should be entirely prohibited. This sense of Congress is indicated in the debate, the legislative history, the wording of the statute, and in the opinion of the author of Title III." (Comment, supra, 7 U. Tol. L.Rev. 185, 203-204.)

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9. The SEnate report states that the Act "establishes a blanket prohibition against the interception of any wire communication." (Sen. Rep. No. 1097, 1968 U.S.Code Cong. & Admin. News, supra, at p. 2180.) Also, the report explains that the definition of "person' in 18 United States Code section 2510(6) "is intended to be comprehensive." (Id. at p. 2179.)

These views are widely shared. (See, e.g., Note, supra, 27 Buffalo L.Rev. at p. 143 ["It can and ought to be inferred . . . that since Congress was aware of the prevalence of wiretapping domestic relations, its failure to exclude this area from the Act's broad prohibitions was deliberate."]; Note, supra, 12 Val. U.L.Rev., at p. 539 [". . . Congress did intend to include interspousal electronic surveillance within the scope of Title III . . . ."]; Comment (1972) 11 Ga.L.Rev. 427, 434 ["The language of Title III is not ambiguous, and the legislative history supports a literal interpretation of the statute's broad prohibition against interception of oral or wire communications . . . . The failure of Congress to include interspousal surveillance among the express exceptions to Title III was therefore intentional."]; but cf. Note (1989) 57 Fordham L.Rev. 1035.)

In light of the Act's plain language and equally plain history, the overwhelming majority of courts that have considered the issue have also concluded that Title III's penalties and prohibitions apply to domestic surveillance. (Heggy v. Heggy (10th Cir. 1991) 944 F.2d 1537, cert. denied (1992) 112 S.Ct. 1514; Kempf v. Kempf (8th Cir. 1989) 868 F.2d 970; Pritchard v. Pritchard (4th Cir. 1984) 732 F.2d 372; United States v. Jones, supra, 542 F.2d 661; Nations v. Nations (W.D.Ark. 1987) 670 F.Supp. 1432; Flynn v. Flynn (N.D.Ohio 1983) 560 F.Supp. 922; Heyman v. Heyman (N.D.Ill. 1982) 548 F.Supp. 1041; Gill v. Willer (W.D.N.Y. 1980) 482 F.Supp. 776; Kratz v.

Kratz, supra, 477 F.Supp. 463; Turner v. PV Intern. Corp. (Tex.Ct.App. 1988) 765 S.W.2d 455; Ex Parte O'Daniel (Ala. 1987) 515 So.2d 1250; Pulawski v. Blais, supra, 506 A.2d 76; Rickenbaker v. Rickenbaker (N.C. 1976) 226 S.E.2d 347; Stamme v. Stamme (M.Ct.App. 1979) 589 S.W.2d 50; see also Campiti v. Walonis (1st Cir. 1979) 611 F.2d 387, 391-392.) In addition, a number of courts have held that state wiretap statutes modeled on the federal Act provide no exception for domestic surveillance. (Ransom v. Ransom (Ga. 1985) 324 S.E.2d 437; Pica v. Pica (App.Div. 1979) 417 N.Y.S.2d 528, 530; Burgess v. Burgess (Fla. 1984) 447 So.2d 220, 222; State v. Jock (Del. 1979) 404 A.2d 518.)

Pritchard v. Pritchard, supra, 732 F.2d 372, is representative of the extensive case law on the subject. After careful consideration of the text, the legislative history, the relevant decisional law and the commentaries, the federal court concluded: "[W]e find that Title III prohibits all wiretapping activities unless specifically excepted. There is no express exception for instances of willful, unconsented to electronic surveillance between spouses. Nor is there any indication in the statutory language or in the legislative history that Congress intended to imply an exception to facts involving interspousal wiretapping." (Id. at p. 374.)

United States v. Jones, supra, 732 F.2d 372, is equally instructive: "Our review of the legislative history of this section, testimony at congressional hearings, and

debates on the floor of Congress, inescapably lead to the conclusion that 18 U.S.C. § 2511(1)(a) establishes a broad prohibition on all private electronic surveillance and that a principal area of congressional concern was electronic surveillance for the purposes of marital litigation." (Id. at p. 669.)

One federal Court of Appeals has concluded that the Act does not prohibit a spouse from intercepting the telephone conversations of the other spouse. In Simpson v. Simpson (5th Cir. 1974) 490 F.2d 803, cert. denied (1974) 419 U.S. 897, a wife filed a civil damage suit against her husband under Title III, alleging that the husband had used a recording device in the marital home to intercept conversations between the wife and another man. While acknowledging that the "naked language of Title III, by virtue of its inclusiveness, reaches this case," the Simpson court nevertheless concluded that Congress did not intend to intrude "into areas normally left to the states, those of the marital home and domestic relations." (Id. at p. 805.) Several subsequent decisions have uncritically accepted the so-called "spousal" exception unveiled in Simpson. (See Anonymous v. Anonymous (2d Cir. 1977) 558 F.2d 667; Lizza v. Lizza (E.D.N.Y. 1986) 631 F.Supp. 529; Baumrind v. Ewing (S.C. 1981) 279 S.E.2d 359; Perfit v. Perfit (C.D.Cal. 1988) (693 F.Supp. 851.) It was this purported exception which formed the

basis of the Court of Appeal's decision herein.[10/]

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10. The spousal exception set forth in Simpson was narrowed somewhat in Anonymous v. Anonymous, supra, 558 F.2d 667. There, the defendant had allegedly recorded selected telephone conversations between his daughter and the plaintiff, his ex-wife. The court, relying on Simpson, held that the matter involved a purely domestic dispute and therefore did not violate the Act. However, the court distinguished the facts before it from a situation where the defendant spouse intercepts all incoming telephone calls, including the conversations of nonfamily members; the latter, the court reasoned, removes the scenario from the province of a mere domestic dispute. (Id. at p. 679.) The same court subsequently applied this distinction in Citron v. Citron (2d Cir. 1983) 722 F.2d 14, holding that a spouse who placed a recording device on the family telephone and recorded all incoming and outgoing calls invaded the privacy of not only her spouse but numerous other individuals, and therefore was amenable to suit under Title III. Although this case presents facts more similar to those in Citron than Anonymous (the victim here intercepted all incoming and outgoing calls), the distinction is legally meaningless. The Act, as noted, contains no exception, express or implied, for "domestic" wiretaps however narrowly defined.

Another court has distinguished Simpson from the situation where a family member acts with the aid of some third party, e.g., a private investigator. (Remington v. Remington (E.D.Pa. 1975) 393 F.Supp. 898.) In such a case, the court held that Title III's civil remedies are available in an action by one spouse against the other. (Id. at p. 901; see also White v. Weiss (8th Cir. 1976) 535 F.2d 1067.) As several courts have observed, however, the participation of a nonfamily

Simpson's reasoning has been subjected to severe criticism, and its holding has been repudiated by the vast majority of legal commentators and state and federal courts. The leading treatise authors, Professor James G. Carr, Reporter for the American Bar Association Task Force on Electronic Surveillance, and Clifford Fishman, author of Wiretapping and Eavesdropping (1978), are unanimous in their condemnation. According to Professor Carr, Simpson and its limited progeny "disregard the straightforward legislative framework and unambiguous statutory language . . . ." (Carr, The Law of Electronic

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member constitutes a "classic 'distinction without a difference.'" (United States v. Jones, supra, 542 F.2d at p. 670; accord Kratz v. Kratz, supra, 477 F.Supp. at p. 471; see also Comment, 27 Buffalo L.Rev., supra, at p. 146.) Under the Act it makes no difference whether the wiretap is placed by a spouse or by a third party acting at the direction of the spouse; the invasion and the illegality remain the same.

In another variant on the Simpson theme, the Tenth Circuit Court of Appeals has held that while the Act plainly prohibits one spouse from wiretapping the other (Heggy v. Heggy, supra, 944 F.2d 1537), it does not prohibit a custodial parent from eavesdropping on a minor child. (Newcomb v. Ingle (10th Cir. 1991) 944 F.2d 1534.) The Newcomb court did not articulate a principled distinction between the two cases other than to observe that the spousal situation is "qualitatively different from a custodial parent tapping a minor child's conversations within the family home." (Id. at pp. 1535-1536.)

Surveillance (2d ed. 1991) § 3.6, p. 3-107.) Fishman observes that "[m]ost courts have rejected Simpson" and explains: "The trend is against the Simpson 'marital home' exception and properly so; even assuming the creation of such an exception would be sound policy, it is clear from the language and history of Title III that Congress intended no such exception." (Fishman, Wiretapping and Eavesdropping (1991 Supp.), § 25.1, pp. 202-203)[11]/

As noted, the great majority of courts have also rejected Simpson v. Simpson, supra, 490 F.2d 803, concluding that its holding is flatly contrary to the history, text and purposes of Title III. (Heggy v. Heggy, supra, 944 F.2d at p. 1540; United States v. Jones, supra, 542 F.2d at pp. 666-673; Pritchard v. Pritchard, supra, 732 F.2d at p. 374; Kempf v. Kempf, supra, 868 F.2d at pp. 971-973; Nations v. Nations, supra, 670 F.Supp. at pp. 1434-1436; Kratz v. Kratz, supra, 477 F.Supp. at pp. 468-475; Turner v. PV Intern. Corp., supra, 765 S.W.2d at p. 470; Ex Parte O'Daniel, supra, 515 So.2d at pp. 1252-1253; Pulawski v. Blais, supra, 506 A.2d at p. 77, fn. 2; Rickenbacker v. Rickenbacker, supra, 226 S.E.2d at p.

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11. Professor Robert Blakey, who was instrumental in the passage of Title III, has also repudiated the holding in Simpson. He has written: "Title III was intended to mean what it says -- no surveillance by third parties without a warrant -- by cops, spouses . . . or any other relevant relations." (Quoted in Comment, supra, 7 Tol. L.Rev. at p. 203, fn. 85.)

352; Heyman v. Heyman, supra, 548 F.Supp. at p. 1047; Gill v. Willer, supra, 482 F.Supp. at p. 778; Stamme v. Stamme, supra, 589 S.W.2d at pp. 52-53; State v. Jock, supra, 404 A.2d at pp. 521-522.)

As all of these authorities have observed, Simpson v. Simpson, supra, 490 F.2d 803, was conspicuously flawed in several key respects. It inexplicably ignored both the clear language of the statute and the abundant legislative history demonstrating that Congress was keenly aware of the use of wiretaps in marital disputes, yet made no exception for their use. The Simpson court also based its decision on the doctrine of interspousal immunity, speculating that Congress did not intend to intrude into an area normally left to the states. The fallacy of this reasoning is also evident. There is no persuasive evidence that Congress intended to defer to the states in this area; on the contrary, the legislative history demonstrates that one of the goals of the Act was precisely to forbid marital wiretapping. Furthermore, as many critics of the decision have observed, state law is far from uniform on the subject of interspousal immunity; numerous states have abrogated the doctrine entirely. (United States v. Jones, supra, 542 F.2d at p. 672; Nations v. Nations, supra, 670 F.Supp. at p. 1435; Comment, supra, 7 Tol. L.Rev. at p. 190, fn. 27; Comment, supra, 27 Buffalo L.Rev. at p. 153; Note, supra, 12 Val. L.Rev. at p. 550.) Moreover, the doctrine of interspousal immunity is

designed to preserve domestic tranquility, an interest that is hardly furthered by allowing interspousal wiretapping, particularly if the evidence is then admissible in divorce proceedings. (State v. Jock, supra, 404 A.2d at p. 520; Heyman v. Heyman, supra, 548 F.Supp. at p. 1047.) As Professor Carr has observed, the "surveillance and its discovery have probably done far more harm to marital unity than could be caused by a lawsuit." (Carr, supra, The Law of Electronic Surveillance, § 3.6, p. 3-108.)

The Simpson court also relied on Title III's so-called "extension phone" exception. The Act excludes from the definition of prohibited intercept devices "any telephone . . . furnished to the subscriber or user by a communications common carrier . . . and being used . . . in the ordinary course of its business." (18 U.S.C. 2510(5)(a).) In explaining this section, one witness at the congressional hearings stated that the Act was not designed to prohibit the casual use of an extension phone to overhear a conversation of a family member.[12/] As many have observed, however, there is no evidence that

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12. The witness's statement was as follows: "I take it nobody wants to make it a crime for a father to listen in on his teenage daughter or some such related problem. . . ." (Hearings on the Anti-Crime Program, Before Subcommittee No. 5 of the House Judiciary Com. 90th Cong., 1st Sess., at p. 989 (1967) (testimony of professor Herman Schwartz), quoted in Kratz v. Kratz, supra, 477 F.Supp. at p. 474.)

Congress considered systematic wiretapping to represent the use of an extension phone "in the ordinary course of business." (United States v. Harpel (10th Cir. 1974) 493 F.2d 346, 351; Gerrard v. Blackman (N.D.Ill. 1975) 401 F.Supp. 1189; State v. Shaw (N.C.Ct.App. 1991) 404 S.E.2d 882, 889; Rickenbacker v. Rickenbacker, supra, 226 S.E.2d at p. 350; Comment, supra, 27 Buffalo L.Rev. at pp. 147-151.)[13]

The differences between casually overhearing part of a conversation on an extension phone and intentionally wiretapping all incoming and outgoing calls are substantial; the former requires the physical presence of the eavesdropper, which inherently limits the extent and frequency of the invasion; the latter, by contrast, requires no supervision, is of potentially unlimited duration, and is wholly indiscriminate. (Lee v. Florida (1968) 392 U.S.

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13. Professor Carr in his treatise on electronic surveillance has observed that the Act "requires that both the installation and use of the excepted instrument be normal." (Carr, supra, The Law of Electronic Surveillance, § 3.2(d)(1), p. 3-42.) Thus, courts must carefully "distinguish between a use which may be justifiably viewed as normal (i.e., an anxious parent's understandable overhearing of a drug abusing child's conversations)," and more extensive invasions of privacy represented by systematic electronic surveillance. (Id., § 3.6, p. 3-110; see Campiti v. Walonis (1st Cir. 1979) 611 F.2d 387 [systematic monitoring of prisoners' conversations does not constitute use of a telephone "in the ordinary course of business" under the Act].)

378, 381; United States v. Jones, supra, 542 F.2d at p. 673, fn. 24; Kratz v. Kratz, supra, 477 F.Supp. at p. 474; State v. Guhl (1976 Ga.App.) 230 S.E.2d 22, 26; Comment, supra, 7 U. Tol. L.Rev. at pp. 205-206.)[14] Whatever Congress might have intended concerning the occasional use of an extension phone by a parent, we find no evidence of a legislative intent to create a wholesale exception for systematic interspousal wiretapping.[15]

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14. One court has held, for example, that an employer might legitimately listen in on an employee's conversation "in the ordinary course of business" where the employer has particular suspicions about confidential information being disclosed, knows that a particular phone call is with an agent of the competitor, and eavesdrops for only so long as the call involves the type of information he fears is being disclosed. (Briggs v. American Air Filter Co. (5th Cir. 1980) 630 F.2d 414, 420; see also Watkins v. L.M. Berry & Co. (11th Cir. 1983) 704 F.2d 577, 582-584; Burnett v. State (Tex.Ct.App. 1990) 789 S.W.2d 376, 378-379.) Thus, the intercept is limited to a particular purpose, place and time; the Act does not condone the general practice of surreptitious electronic monitoring.

15. One legal writer has examined the legislative history of Title III and concluded that there "is no evidence that any member of Congress ever acknowledged that one of the purposes of the extension phone exception was to allow a father to eavesdrop on his teenage daughter. In fact, the history of Title III suggests precisely the opposite." (Comment, supra, 27 Buffalo L.Rev. at p. 149.) We express no view on this question, which is not before us, other than to hold that

In sum, we follow a majority of the courts in declining to read into Title III an exception for interspousal or domestic wiretapping. Neither the text, the history nor the purposes of Title III permit the conclusion that defendants' conversations were lawfully intercepted.

3. Private Wiretaps

Having concluded that the tapes were unlawfully procured, we are bound to conclude that their use at trial was erroneous. Section 2515 provides that whenever any wire communication has been intercepted, "no part of the contents of such communication and no evidence derived therefrom may be received in evidence . . . if the disclosure of that information would be in violation of this chapter." As parties to the conversations, defendants were statutorily entitled to suppression on the ground that their communications were "unlawfully intercepted." (18 U.S.C. § 2518(10)(a)(i).)

The government contends, however, that such a literal reading of Title III would be at variance with the congressional intent; according to the Attorney General, section 2515 is intended to deter governmental rather than private violations of Title III. Therefore it would be

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whatever the scope of the so-called extension phone exception, it provides no authority for an implied domestic wiretap exception to the Act.

pointless to apply section 2515 where, as here, the government is the innocent recipient, rather than the actual procurer, of the illegally intercepted communications.

Again, the government's contention does not withstand scrutiny. Where the intent of Congress is expressed in "reasonably plain terms," a court must ordinarily treat that language as conclusive; no resort to extrinsic aids is necessary or proper. (Griffin v. Oceanic Contractors, Inc. (1982) 458 U.S. 564, 570; see also United States v. American Trucking Associations, Inc. (1940) 310 U.S. 534, 524-544 ["There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning."].)

The language of Title III is clear and unambiguous; it provides that no part of the contents of an unlawfully intercepted wire communication may be received in evidence in any proceeding before any state or federal court. (18 U.S.C. §§ 2515, 2518.) The Act draws no distinction between communications unlawfully obtained by the government and those procured unlawfully by private means. Thus, no further analysis is necessary to demonstrate that the taped conversations were inadmissible under Title III.

The government's argument also fails on its own terms, however. The legislative intent underlying Title III, and section 2515 in particular, was definitively expounded by the United States Supreme Court in Gelbard v. United States, supra, 408 U.S. 41. Quoting directly from the Senate committee report that accompanied the bill (Sen. Rep. No. 1097, 90th Cong., 2d Sess. (1968), reprinted in 1968 U.S. Code Cong. & Admin. News 2112), the high court stated that the Act has a "dual purpose: (1) protecting the privacy of wire and oral communications, and (2) delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized." (Gelbard v. United States, supra, 408 U.S. at p. 48.)

The Supreme Court characterized the protection of individual privacy as the "overriding congressional concern." (Gelbard v. United States, supra, 408 U.S. at p. 48.) That concern extended not only to the initial invasion represented by the illegal wiretap, but to subsequent invasions occasioned by the use and disclosure of the taped conversations at trial. Congress's findings make that concern clear: "[I]ntercepting devices are being used to overhear . . . conversations made in private" and the "contents of these communications . . . are being used by public and private parties as evidence in court and administrative proceedings. . . ." (Pub.L. 90-351, § 801, 82 Stat. 211.)

To remedy the problem of multiple invasions

resulting from subsequent disclosures at trial, Congress extended to the victims of illegal wiretaps, private or otherwise, the full panoply of statutory remedies. Chief among these, of course, is the evidentiary prohibition of section 2515, which the high court has characterized as the primary enforcement mechanism of the Act's strict limitations upon invasions of individual privacy. (Gelbard v. United States, supra, 408 U.S. at pp. 48-50.) As the Senate report observed: "'[Section 2515] forms an integral part of the system of limitations designed to protect privacy. Along with the criminal and civil remedies, it should serve to guarantee that the standards of the new chapter will sharply curtail unlawful interception of wire and oral communications.' " (1968 U.S. Code Cong. & Admin. News at p. 2185, quoted in Gelbard v. United States, supra, 408 U.S. at pp. 50-51, fn. 9.)

Congress was also concerned about the effect on the integrity of the courts of admitting illegally procured evidence. As the high court has explained, the suppression sanction of section 2515 was designed "not only to protect the privacy of communications, but also to ensure that the courts do not become partners to illegal conduct: the evidentiary prohibition was enacted also 'to protect the integrity of court and administrative proceedings.' " (Gelbard v. United States, supra, 408 U.S. at p. 51, quoting from the congressional findings, Publ.L. 90-351, supra, § 801, 82 Stat. 211, italics added.) It is wholly immaterial to the accomplishment of these express

congressional goals whether the wiretap was perpetrated by private or governmental means.

Contrary to the claims of the Attorney General, therefore, the legislative history of Title III demonstrates that Congress was aware of the problem of private wiretapping and intended to curb its abuse by means of the suppression sanction. Any other conclusion would patently contravene the congressional injunction that "courts . . . not become partners to illegal conduct." (Gelbard v. United States, supra, 408 U.S. at p. 51.)

Numerous courts, both state and federal, have so concluded. The leading federal case is United States v. Vest (1st Cir. 1987) 813 F.2d 477. There, the defendant, a police detective, was indicted for making false statements before a grand jury. He moved to suppress a private recording proving that, contrary to his statements under oath, he had accepted a bribe. The district court held that the contents of the tape must be suppressed under Title III. (United States v. Vest (D.Mass. 1986) 639 F.Supp. 899.) The Court of Appeal affirmed, rejecting the government's claim -- identical to the argument here -- that section 2515 is inapplicable "where the government is merely the innocent recipient, rather than the procurer, of an illegally-intercepted communication." (813 F.2d at p. 480.) As the federal court explained, section 2515's "'importance as a protection for the victim of an unlawful invasion of privacy' could not be more clear." (Id. at p. 481, quoting Gelbard v. United States, supra, 408 U.S. at

p. 50.) That invasion is not necessarily complete when the interception occurs, the court observed, but may be compounded by subsequent disclosure in court or elsewhere. The "impact of this second invasion is not lessened by the circumstance that the disclosing party (here, the government) is merely the innocent recipient of a communication illegally intercepted by the guilty interceptor (here, Waters)." (Ibid.)

A similar conclusion was reached in United States v. Phillips (8th Cir. 1976) 540 F.2d 319, cert. denied (1976) 429 U.S. 1000. There, as in Vest, the defendant was accused of perjury based on certain false statements before a grand jury. The critical evidence at trial was a conversation between defendant and two compatriots recorded by a private detective. In resolving the issue of admissibility, the court rejected the government's threshold claim that the Act did not apply where the government was merely the innocent recipient of a privately recorded conversation. As the court stated: "We also reject the government's argument . . . that the tape is independently admissible because the government had no part in the decision to record or the actual recording of the conversation. . . . [T]he fourth and fifth amendments proscribe government action, not private action. We are concerned here with a specific statutory directive that certain conversations which are electronically intercepted by private persons are not admissible in any official proceeding." (Id. at p. 327, fn. 5, italics added.)

Several state courts have also concluded that evidence derived from an unlawful private wiretap is inadmissible in a criminal prosecution. In State v. Dwyer (Ariz.Ct.App. 1978) 585 P.2d 900, for example, the court affirmed the granting (by then Superior Court Judge Sandra Day O'Connor) of defendant's motion to suppress certain conversations overheard by a telephone operator which implicated defendant in a conspiracy to commit murder. Over a vigorous concurring opinion which conceded that the result was compelled under Title III but challenged its wisdom and called for a congressional amendment of the Act (id. at pp. 904-906), the Arizona court held that the conversation was unlawfully intercepted and therefore inadmissible under section 2515. (Id. at p. 904.)

Com. v. DeBlase (Pa.Super.Ct. 1986) 515 A.2d 564 presents the same issue on facts strikingly reminiscent of those at bar. A wealthy real estate developer was murdered in January of 1982. Prior to his death, he secretly installed a line-activated tape recorder on his estranged wife's private telephone for use in a divorce proceeding. The recordings documented an illicit tryst between the victim's wife and her 23-year-old nephew. Based on this recording and other information, the nephew, DeBlase, was arrested and charged with murder. The trial court granted a motion to suppress the contents of the tape under the Pennsylvania Wiretap Act (18 Pa. C.S. § 5701 et seq.). Modeled in part on Title III, the

Pennsylvania law contains a statutory exclusionary rule substantially similar to the federal provision. (18 Pa. Cons. Stat. § 5721 ["Except as proof in a suit or prosecution for a violation of this act, no evidence obtained as a result of an unlawful interception shall be admissible in any such proceeding . . . ."].) On appeal, the government urged that the court should create an exception to the Act where the victim rather than the government engaged in the unlawful recording. The court rejected the contention, explaining as follows: "Such an exception is not provided for in the express language of the Act nor do we find that such an exception would be in keeping with the overall structure and provisions of the Act. The communications were intercepted in violation of the Act and were properly suppressed by the trial court." (515 A.2d at p. 566.)

Florida is another state with a wiretap statute modeled on the federal Act. (Horn v. State (Fla.Dist.Ct.App. 1974) 298 So.2d 194, 197-198.) Indeed, the Florida exclusionary provision, Florida Statutes section 934.06,[16/] is nearly identical in terms to section 2515. In

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16. The Florida statute provides: "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the state, or a political subdivision thereof, if the

Horn v. State, supra, 298 So.2d 194, the issue was whether the Florida statute compelled the suppression of critical evidence that placed the defendant at the scene of his wife's murder. Defendant denied guilt and adduced testimony from several witnesses supporting his alibi that he was elsewhere at the time of the killing. However, a coworker of the victim testified that she had used an extension phone to eavesdrop on a telephone call in which defendant told the victim that he would pick her up after work. She was killed shortly thereafter.

Concluding that the text and meaning of the statute were plain, the Florida court held that the eavesdropping was unlawful and the contents of the illegally overheard conversation were therefore inadmissible. (Horn v. State, supra, 298 So.2d at p. 198-199.) Moreover, because the testimony relative to the intercepted conversation was highly prejudicial, the court was compelled to reverse the judgment and remand for a new trial. (Ibid.)[17]

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disclosure of that information would be in violation of this chapter."

17. Two subsequent Florida decisions have reached similar conclusions. In Nova v. State (Fla.Dist.Ct.App. 1977) 346 So.2d 1214, the court reversed a murder conviction, holding that the wiretap statute prohibited the testimony of a coworker of the victim concerning a conversation on which she unlawfully eavesdropped. In State v. Walls (Fla. 1978) 356 So.2d 294, the Florida

Finally, in a case closer to home, the California Court of Appeal recently concluded that Title III compelled the suppression of a tape recording procured by a private citizen in violation of the Act. In People v. Murtha (1991) 235 Cal.App.3d 1688, a magistrate issued a search warrant for the defendant's home based in part on telephone conversations between defendant and a third party which a confidential informant had surreptitiously tape recorded. Following the denial of his motions to quash the warrant and suppress evidence, the defendant entered a plea of nolo contendere.

The Court of Appeal held that under Title III the recorded conversations could not properly be used to support the warrant. In so holding, the court expressly rejected the government's claim that the Act did not apply because the tape was made by a private party. "The

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Supreme Court applied the same statute to hold inadmissible the tapes of several threatening telephone calls which the alleged victim had surreptitiously recorded. (Unlike the federal statute, which does not prohibit interceptions by a party to the communication, the Florida wiretap prohibits the interception "unless all of the parties to the communication have given prior consent . . . ." (Fla. Stat. § 934.03(2)(d).) As the Florida court observed: "The language of the statutes in question is clear and unambiguous, and no exception for the situation before us is provided. This Court cannot substitute its judgment for that of the Legislature and create an exception which would encompass the instant circumstances." (356 So.2d at p. 296.)

wording of section 2515, which bars the use in any court of the contents of any illegally intercepted wire communication, or any evidence derived therefrom, provides no room for an interpretation that would permit the use in this case of the admittedly illegal recordings of appellant's telephone conversations." (People v. Murtha, supra, 235 Cal.App.3d at pp. 1693-1695, original italics.)

In sum, neither the text, the history, nor the purposes of Title III support the government's claim that Congress intended to exempt unlawful private intercepts from the strictures of section 2515. The text of the Act is synonymous with its purpose; we may question the congressional wisdom in adopting so expansive a rule, but we may not, as the Florida Supreme Court observed, "substitute our judgment for that of the Legislature and create an exception which would encompass the instant circumstances." (State v. Walls, supra, 356 So.2d at p. 296.)

In a related argument, the Attorney General urges that section 2515 be construed as coextensive with the Federal Fourth Amendment exclusionary rule. It is well settled, of course, that the latter applies only to governmental searches; it does not preclude the state from using the fruits of illegal searches and seizures by private citizens. (United States v. Jacobsen (1984) 466 U.S. 109, 113-118; Coolidge v. Witt (1971) 403 U.S. 443, 487.) The Government's argument rests on a sentence in the Senate report to the effect that section 2515 was generally not

intended "to press the scope of the suppression role beyond present search and seizure law." (Sen. Rep. No. 1097, supra, at p. 96, reprinted in 1968 U.S. Code Cong. & Admin. News at p. 2185.) Thus, the Attorney General asserts that we may infer a congressional intent to incorporate into Title III the Fourth Amendment exception for evidence unlawfully seized by a private party.

Again, the argument does not withstand scrutiny. In United States v. Giordano, supra, 416 U.S. 505, the United States Supreme Court emphasized that interpretation of section 2515 "does not turn on the judicially fashioned exclusionary rule aimed at deterring violations of Fourth Amendment rights, but upon the provisions of Title III," and indicated that Congress did not intend to make section 2515 strictly coextensive with the Fourth Amendment. (416 U.S. at pp. 524, 528.) Indeed, section 2515 by its terms expands upon Fourth Amendment jurisprudence by making the exclusionary rule applicable across the board in all federal and state proceedings, civil, criminal, administrative, legislative, regulatory or otherwise. (See United States v. Vest, supra, 813 F.2d at p. 482.

Furthermore, as several courts have observed, "Congress could not have intended the courts to disregard . . . the different policy considerations underlying the two rules." (United States v. Vest, supra, 813 F.2d at pp. 481, 483; accord People v. Murtha, supra, 235 Cal.App.3d at p. 1696; Horn v. State, supra, 298 So.2d at p. 201.)

The primary purpose of the Fourth Amendment exclusionary rule is the deterrence of unreasonable searches and seizures in violation of the Constitution, a purpose which clearly would not be furthered by penalizing the police for a private violation. The protection of privacy was the dominant concern of Congress in enacting section 2515 (see Gelbard v. United States, supra, 408 U.S. at p. 48), an interest which, as discussed previously, is served not simply by penalizing the unlawful interception, but also by prohibiting any subsequent invasion in court or elsewhere. (18 U.S.C. § 2511.) As one federal court has explained: "[U]nder Title III, unlike the Fourth Amendment, the invasion of privacy is not simply 'over and done with' when an unlawful intrusion has been effected. Rather, the disclosure or use of information obtained through such an intrusion amounts to a separate injury to the victim's privacy interest. . . . Section 2515 -- beyond serving the traditional exclusionary rule function of deterring future unlawful interceptions -- also plays a role in protecting against the use or disclosure of communications that have been illegally seized." (United States v. Dorfman (7th Cir. 1982) 690 F.2d 1217, 1228; see also People v. Murtha, supra, 235 Cal.App.3d at p. 1696 ["The Fourth Amendment exclusionary rule is intended to deter future constitutional violations . . . . In contrast, suppression under title III is necessary not only to guard against future violations but also to minimize the invasion of privacy inherent in each

re-use of the intercepted material."].)

In sum, the Fourth Amendment requirement of governmental action has no application to the statutory suppression sanction of section 2515.

Finally, the Attorney General argues that the purpose of the statutory exclusionary rule is simply to sanction the perpetrator of the illegal interception, a limited goal which plainly would not be served here. The government relies on a statement in the Senate report to the effect that "the perpetrator must be denied the fruits of his unlawful actions in civil and criminal proceedings." (Sen. Rep. 1097, supra, at p. 69, reprinted in 1968 U.S. Code Cong. & Admin. News at p. 2156.) As discussed above, however, such a narrow reading of the congressional intent does not comport with the Act's text or legislative history. Congress sought to protect individual privacy by banning all surreptitious wiretapping (Gelbard v. United States, supra, 408 U.S. 41); that goal requires suppression of the fruits of an illegal intercept regardless of whether the perpetrator is a party to the litigation or a disinterested third party. Furthermore, it is worth recalling that section 2515 "serves not only to protect the privacy of communications, but also to ensure that courts do not become partners to illegal conduct . . . ." (408 U.S. at p. 51.) Thus, we may not countenance the use of tainted evidence derived from a private wiretap any more than we may exploit evidence procured by the government through illegal means.

The cases on which the government relies are patently inapposite. All involve either minor infractions of provisions of the Act, or taped conversations that were recorded by a party to the conversation, often the defendant himself. Thus, in United States v. Chavez (1974) 416 U.S. 562, the high court permitted the use of information gathered through the use of a police wiretap despite a technical misstatement in the government's application for the wiretap, observing that violations of the Act do not require suppression if they are not significant within the congressional scheme circumscribing how the government may employ electronic surveillance. (Id. at pp. 574-575; see also United States v. Donovan (1977) 429 U.S. 413, 435-437. We do not find, nor does the Attorney General seriously contend, that the surreptitious recordings at issue are analogous to the petty violations in Chavez and Donovan.

The Attorney General's reliance on United States v. Underhill, supra, 813 F.2d 105, Traficant v. C.I.R. (6th Cir. 1989) 884 F.2d 258, and United States v. Nietupski (C.D.III. 1990) 731 F.Supp. 881, is also misplaced. In each case, the defendants sought to suppress tape recordings of illegal activities which they or their coconspirators had themselves procured. In each case, the court refused to permit suppression -- not because section 2515 was inapplicable to unlawful private interceptions -- indeed, the courts assumed that the suppression sanction would otherwise normally apply, but

rather because it would contravene the clear congressional purpose of Title III to allow the perpetrator to benefit from his own illegal act. (See United States v. Underhill, supra, 813 F.2d at p. 112 ["We think it is clear that Congress did not intend for § 2515 to shield the very people who committed the unlawful interceptions from the consequences of their wrongdoing."].) Thus, these decisions are neither pertinent nor persuasive authority.

In sum, we decline to read into the Act an exception permitting the use of evidence illegally intercepted by a private party. We may question the wisdom of Congress in adopting such a broad-based suppression sanction. We may even urge the Congress to consider an appropriate amendment to the Act which would preclude such a result in future cases. We may not, however, substitute our judgment for that of the legislature. Neither the contents of the tape recordings nor any evidence derived therefrom was properly admissible in any of the proceedings below.[18/]

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18. As several courts have concluded, there is strong evidence that Congress intended an exception to the section 2515 exclusionary rule to permit the use of unlawfully intercepted evidence for impeachment purposes. (United States v. Vest, supra, 813 F.2d at p. 484; United States v. Winter (1st Cir. 1981) 663 F.2d 1120; United States v. Caron (5th Cir. 1973) 474 F.2d 506.) However, that issue is not before us, and we therefore express no views on the subject.

4. Prejudice

The final issue to be resolved is whether the erroneous admission of the taped conversations was so prejudicial as to compel reversal of the judgments of conviction.

A review of the record reveals that the tapes played a critical role in the state's case against defendants. To be sure, the prosecution adduced substantial independent evidence of motive on the part of both defendants, and cast substantial doubt -- based on the physical evidence -- on Brenda's account of the events surrounding the murder. Nevertheless, it is apparent that the tapes themselves constituted the strongest evidence of motive, opportunity, planning and deliberation. The so-called whispering tape provided tangible proof of an ongoing relationship between defendants, and supported the prosecution's theory that defendants were plotting Joe's murder at least several days prior to the event. The second tape also shows planning activity by Mark, as he refers to "trad[ing] cars" and inquires of Brenda whether Jolynn, the victim's daughter, will be working the night of the murder. Although the dialogue is ambiguous and subject to interpretation, there is no doubt that the taped conversations provided the most dramatic and compelling evidence of guilt.

The centrality of the tapes was confirmed by the prosecutor in closing argument. She not only played the

"whispering" tape for the jury but displayed an enlarged reproduction of the entire text of the conversation. She ridiculed defense counsel's suggestion that defendants were simply planning an innocent assignation, stating: "[The conversations . . . can only reasonably and logically be understood to mean that Brenda and Mark were planning to kill Joe Otto. The evidence shows it, and you know it. And I know it. And the Defendants know it. Anyone who puts those conversations in context knows that they were discussions about killing Joe Otto, period, not setting up a sexual rendezvous or anything else you might be able to stretch your imagination to think of."

The prosecutor repeatedly adverted to the tapes as concrete evidence of defendants' deliberate plan to commit murder. Referring to the conversation in which Mark asks Brenda whether Joe's daughter will be working the night of the murder and makes reference to "trad[ing]" cars, the prosecutor asks: "Can you reasonably explain away this conversation considering all the evidence as something other than a confirmation that he's going over to the Otto house later on?. . . . [¶] They have a plan there. And that's the only person Brenda has a conversation with that night that indicates this sort of action in concert."

The prosecutor also stressed Brenda's reaction when first confronted with the tapes, particularly her response when the police asked whether she had ever discussed killing her husband on the telephone: "Does

Brenda say, 'Are you crazy?' Does she react with outrage? Does she say 'How dare you suggest such a thing?' . . . Brenda doesn't say either of these things. [¶] After several seconds, she says, 'No, I don't think so.' And Brenda must have been thinking to herself, 'My God, did we ever say "kill" on the phone? Didn't I turn off the tape recorder. Did that S.O.B. have another one some place? What do these people know?'"

The tapes, in short, were the linchpin of the state's case against defendants. Under any standard of error, the conclusion is inescapable that defendants' convictions must be reversed.[19/] We emphasize that

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19. The parties disagree as to the harmless error standard applicable to violations of the Act; defendants predictably argue that affirmance requires a finding the error was harmless beyond a reasonable doubt under Chapman v. California (1967) 386 U.S. 18; the State urges a reasonable probability test under the state and federal standards for nonconstitutional error. (People v. Watson (1956) 46 Cal.2d 818; United States v. McAllister (9th Cir. 1984) 764 F.2d 1273, 1277; Fed. Rules Crim. Proc., rule 52(a); 28 U.S.C. § 2111.) There has been no definitive statement by the federal courts concerning the harmless error standard to be applied in cases involving violations of Title III. (Compare United States v. Russo (10th Cir. 1975) 527 F.2d 1051, 1057 [admission of illegally recorded conversations "was indeed harmless beyond a reasonable doubt."] with United States v. Gomez (5th Cir. 1990) 900 F.2d 43, 45 [the court must determine whether an erroneously admitted tape recording "affected the appellant's

reversal is premised solely upon an error of law, rather than insufficiency of the evidence. Accordingly, a retrial is not precluded by the double jeopardy clause. (People v. Shirley (1982) 31 Cal.3d 18, 71.)

DISPOSITION

The decision of the Court of Appeal affirming the judgment of the trial court is revered.

ARABIAN, J.

WE CONCUR:

LUCAS, C. J.
MOSK, J.
PANELLI, J.
KENNARD, J.
BAXTER, J.
GEORGE, J.

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substantial rights . . . See Fed.R.Crim.P. 52(a)."].) We need not resolve the question here, however, for as explained above the tapes were sufficiently central to the prosecution as to be prejudicial under any standard.

APPENDIX B

6th H004612 - S019773

ORDER DENYING REHEARING

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

PEOPLE, Respondent

v.

BRENDA SUE OTTO et al., Appellants

Petition for rehearing DENIED.

BEST AVAILABLE COPY

APPENDIX C

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE OF THE
STATE OF CALIFORNIA,

Plaintiff and Respondent, H004612

v. (Santa Clara County
Sup.Ct.No.114532)

BRENDA SUE OTTO, et al.,

Defendant and Appellant.
_____/

Defendants Brenda Otto and Marvin Mark were charged by information with the murder of Brenda's husband Joe Otto (Pen. Code, § 187). Pursuant to Penal Code section 995,[1/] defendants moved to set aside the

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1. Further statutory references are to the Penal Code unless otherwise stated.

* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of parts III, IV, V, VI, VII, VIII, IX, X, XI, and XII.

information on the basis that the victim's unlawful interception of their telephone conversations rendered the resulting tape recordings inadmissible under Title 18, United States Code Annotated, section 2510 et seq.[2/] A jury found both defendants guilty of first-degree murder. Each defendant was sentenced to the statutory term of 25 years to life.

I

FACTS

At about 3 p.m. on October 13, 1986, Joe Otto went to his neighbor Scott Kennedy's house to discuss a "personal matter." Scott, a San Jose police officer, listened as Joe, who was very upset, played the so-called "whispering tape" recording of a conversation between his wife Brenda and someone named "Mr. Mark." The male voice called Brenda "honey," made reference to everything being wrong, to seeing items covered with sheets outside which someone must be watching, to an accident on the corner, and to a party in progress across the street, and then said "I tried every way possible." When the male

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2. Writ review of the order denying the section 995 motion was sought in this court (H003730). The petition was denied without opinion on November 25. 1987.

reacted negatively to finding out Brenda was calling from home, she explained she had "learned how to unplug it." Later in the tape, the male voice said, "I got a better plan."[3/]

References in the tape placed the time of the recording as Saturday night, October 11th. A neighbor's party was in progress when Scott returned home at 1:30 or 2 a.m. on the 12th, the Ottos had had a garage sale the preceding day and had left unsold items outside covered by sheets, and a car accident, which occurred nearby at 11:10 p.m. Saturday night, was not cleared until midnight.

Joe also played the whispering tape to his daughter Jolynn who lived with the Ottos while working night shift at Agnews State Hospital. Joe told Jolynn the tape was made after he went to bed; Jolynn recalled finding the front door unlocked Sunday morning when she returned from work although her father said he had locked it before retiring.

On Tuesday, October 14th, Jolynn warned her father that Brenda had asked about her work schedule. Joe said Brenda also talked with him about Jolynn's schedule. Concerned, Jolynn and Joe decided Jolynn would tell Brenda she was tired and would leave work

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3. Because several people referred to herein share the same last name, we shall refer to everyone by first name once they are identified in an attempt to simplify our discussion of the facts and law.

early that night if enough hospital staff were present. It was agreed Joe would confront Brenda the next day about his suspicions.

Joe and Jolynn returned home at 6:45 p.m. and found the front door unlocked, the kitchen door wide open, and the dog running around the house. Alarmed, Joe checked the house with his gun. He returned to Jolynn with a tape full of conversation recorded by the voice-activated tape machine under Jolynn's bed. When Brenda drove up, Jolynn suggested Joe play the tape that evening in a tape player she would leave in one of their cars.

As planned, Jolynn mentioned to Brenda her intentions to leave work early that night. Brenda appeared visibly disturbed by the turn of events: "Her back was . . . to me. She dropped a utensil of some sort and turned and scowled and said, you are not going to work? Like that." Brenda said it in a "[d]efinite way."

Jolynn left at 7:30 p.m. to have dinner with her stepfather. She did not return home early. When she did return, her father was dead.

Shortly after 11:50 p.m. on October 14th, Scott was told by his wife Kim that someone was at their door. He looked outside and saw Brenda, who was naked. Although a towel was tied securely around her neck and her hands were tightly bound behind her, Brenda was "just standing there" and was not crying or visibly upset. After obtaining a pistol, Scott answered the door and admitted

Brenda, who screamed, "you have to help Joe. I think they've killed him or he's hurt. Somebody has broken in." Scott testified that Brenda "was screaming quite erratically."

While Scott went out to look for two vehicles Joe had told him about, a 1970's blue Cadillac and a 1970's brown truck, both with Utah plates, Brenda wrapped herself in a blanket and Kim, a Santa Clara County Deputy Sheriff, untied Brenda's bindings. In undoing the tightly knotted belt, Kim saw no marks on Brenda's hands or writs. Nor did she observe any blood or marks of injury, except what appeared to be a rug burn on Brenda's right forearm and elbow and an indentation mark on the left upper shoulder blade which suggested Brenda had been lying on something for a period of time. According to Kim, there wa no blood or moisture of any kind on Brenda's face or hair.

Both Kennedys reported smelling the odor of someone having had sex; Scott said Brenda smelled of semen; Kim detected a similar odor on the freshly laundered blanket which had been wrapped around Brenda.

Brenda recounted that she had fallen asleep while watching TV with Joe but was awakened with the feeling of "stuff" on her face and the presence of two people hurting Joe. Telling this story, Brenda seemed upset but not crying, breathing deeply but talking quite loudly. However, Kim noticed that every time she was on

the phone to the police Brenda stopped sobbing or breathing deeply and became very quiet. Brenda also seemed unusually "intent" on watching the activities of the police, looking out the Kennedys' window to see what they were doing. When she learned Kim was also a police officer, Brenda's sobbing increased.

Officer Wininger arrived at 12:28 a.m. October 15th, and obtained an initial report from Brenda that two Latino men had broken into the house and possibly killed Joe. She said she had been tied up but managed to escape. In a second statement, Brenda reported she had been watching the 11 o'clock news with Joe, heard barking, went outside to feed the dog, and returned after about 10 minutes. Joe woke up, smiled, and fell back to sleep in his chair. Right after that she saw a large Latino man "come out of nowhere" and stand next to Joe. Brenda heard a loud noise like two logs banging together; at the same time, she felt something sprayed on her face. As she tried to flee, the intruder struck her on the left side of her face with his hand. Maintaining her balance, she headed for the door when a second man grabbed her housecoat, ripped off her bra, and knocked her back onto a wrought iron fixture, following which she passed out. She regained consciousness to find her hands tied behind her back and her ankles tied with her panty hose. Calling out to Joe, she received no response. Eventually she untied her feet and reached the Kennedy house.

The officers found Joe dead on the floor of the

family room. All lights and the television were off. An afghan covered Joe's upper chest and head. He had died of "massive" head injuries from "a very significant and forceful trauma." Much of his skull and brain had been destroyed.

The pathologist located injuries from three to five major blows delivered to the head, each of which was severe enough to "incapacitate" Joe immediately. The injuries, consistent with the use of an elongated blunt instrument such as a bat, two by four, or jack handle, did not appear to have been caused by a short-barrel gun. There was no evidence of "defensive wounds."

Once Scott informed police of his conversation with Joe and of the existence of the whispering tape, the investigation shifted to Brenda. By 4:20 a.m. Sergeant Graves began a taped interview with her, parts of which were played for the jury. The first part presented a tearful Brenda describing how she first met Joe a year before. She described their relationship after the marriage as "I think good." They had "bickered" during the weekend garage sale, "but [it was] not a bad relationship."

The second part concerned Graves confronting Brenda with the whispering tape. When he asked whether she had ever discussed killing Joe on the phone, an eight-second pause ensued, followed by Brenda whispering: "No -- I don't think so." When Graves persisted, Brenda denied the existence of such a discussion and stated she was not aware Joe recorded her phone calls. When

Graves asked whether she was certain she never discussed someone entering the house to kill Joe, Brenda responded: "Not that I know of." Graves replied it was not the kind of discussion a person would have any doubt about having or not having. Brenda again paused, shook her head no, and answered: "No -- I don't remember." She added she did not "think" the conversation existed.

Graves exhorted Brenda to tell the truth, informing her he had the tape. She answered, "No conversation" and denied remembering having the whispering conversation.[4/]

Brenda was arrested at 6:30 a.m. Officer Wells escorted her to Valley Medical Center to be examined for injuries and sexual assault. Before she left, Wells, a female officer, had Brenda undress and photographed her. Wells found no blood or injuries to Brenda's face nor could she find evidence of injuries consistent with Brenda's claim of having been struck unconscious. Wells noted particles consistent with dried flowers on Brenda's chest, back and pubic areas.[5/] At the nape and right side of Brenda's neck, Wells saw marks that looked like an

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4. Brenda also stated in this part of the tape that she had told various people that she did not like being married and that it was a hard adjustment after being single so long.

5. These particles were consistent with dried flowers found on the floor of the murder scene.

abrasion caused by something rubbing against her neck. Also detected was an injury underneath Brenda's right arm and across the right side of her chest, and a small mark on the right wrist. The "rape kit" analysis for Brenda was negative for foreign pubic hairs or semen and no evidence of semen or sexual activity was found at the crime scene.

The investigation led to Marvin Mark who Graves interviewed at 9:50 p.m. on October 15th. In his taped statement, Marvin recounted how he met Brenda in August 1985 and their subsequent romantic involvement. He lived with her until she said she was marrying an impotent old man who wanted a young wife to show off. That development was a "little upsetting" but Marvin understood Brenda's need for financial security, which he could not provide.

Marvin moved out of the DeRose Street house he shared with Brenda on September 1st, the day after he last had sex with her, but moved back in when Brenda moved out. He and Brenda were "still friends"; they frequently met by prearrangement at a parking lot near his house on the way to work to exchange mail and checks. They last met there Tuesday morning.

Marvin claimed he had recently driven to Utah in a U-Haul to bring back furniture. He returned the previous Friday, October 10th. Either that day or Saturday, he drove to the Ottos' garage sale to look at a washer and dryer where he talked with Joe, who did not sound friendly or appear willing to charge a fair price.

Marvin drove by again Saturday evening in his pickup truck, without stopping, to look at a camper trailer for sale that he had no extra money to pay for in any event.

Marvin said Brenda phoned him Saturday afternoon, complaining about Joe, who was on her case and worried about her talking to Marvin. Marvin claimed his last phone conversation with Brenda was Sunday or Monday when they talked about the $325 deposit from the DeRose Street house that Brenda secretly covered for him but which she had to produce in order to placate Joe.

Marvin stated he was at his office all day Tuesday until 8 p.m., using his Cadillac to get home by 8:45 p.m. He then worked until roughly midnight straightening up his house. Between 11:30 p.m. and midnight, he took his dog out in his pickup truck for a run, returning about 1 a.m. During this period he saw or talked to no one. He turned in for the night between 2 and 2:30 a.m.

Midway through the interview Graves told Marvin he had booked Brenda for Joe's murder, that she implicated him, and that recorded conversations existed between him and Brenda in which she told him she learned to unplug the recording machine after Marvin said, "You shouldn't be calling me from your house." Marvin recalled the conversation, but explained his comment as: "Why upset the apple cart."

As to the whispering conversation on Saturday, Marvin claimed he remembered it but did not quite

understand what it was about, although he knew Brenda was upset. He conceded he "shouldn't forget a conversation like that," but was "just [unable to] remember what it is about."

In connection with the Tuesday tape, Marvin could not remember telling Brenda he was going to borrow a car. He insisted he had not recently borrowed anyone's car: "Do I ever borrow? No. I have two. There's no reason to." "What do I need a car for, I've got two." He said he washed his Cadillac earlier in the day (October 15th), even though it might still be dirty inside. Nor did he know why he would ever discuss whether Jolynn, whom he did not know and never met, had gone to work.

Finally, when asked about any injuries he might have, Marvin reported rug burns on his knees from "screwing around" probably on Monday with his girl friend, Karen Palmer, on the rug of his new office in Campbell.

Crime scene investigator Rand parker entered the Otto house early Wednesday morning. He found no evidence of a forced entry. In a closet, he found a loaded .45 caliber semi-automatic pistol in a man's jacket. Various items of jewelry were located in cabinets; examination of closets and the master bedroom, bathroom and office area showed no disarray. The VCR and television set were unplugged in and in place. He found numerous blood splatters in the family room and dining nook and observed an overturned wrought iron rack and

various ceramic or glass knick-knacks on the floor, as well as a coffee table with the objects that had been on it scattered on the floor. The dust covering the top of the table was not disturbed and none of the fragile objects such as shells from the table were broken. A woman's yellow ring was on the family room carpet and Joe had a yellow metal chain with a Krugerrand pendant around his neck. Joe had money on him; his pockets had not been turned inside out.

Underneath the overturned wrought iron rack, Parker found blood splatters but no nicks or indentations in the linoleum that the "fairly heavy" rack might have made if it had fallen on the floor. He observed a shoe print in the area of the overturned rack, which was different from two other shoe prints he located outside the house.[6/] In the dining nook area, the police found a pair of panty hose, a pink bathrobe, and a bra.

Based on his investigation of hundreds of residential burglaries, Parker noted anomalies from his observations at the Otto house and circumstances he typically encountered when investigating a burglary. Usually, outside a burglarized house, he found some obvious point of entry; inside he would find things missing, drawers pulled open or their contents dumped, mattresses

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6. The shoeprints found in and around the house did not match the shoes Joe was wearing. No evidence was produced that they matched any of Marvin's shoes.

moved, clothes pulled from hangers, property stacked near a get-a-way point, and power tools taken from a garage. If a male victim was present, Parker typically found his jewelry or wallet gone and his pockets turned inside out.

Officer Rimer, an expert in blood splatter analysis, testified it was peculiar, given the irregular way homicides happen, that Brenda's panty hose, robe and bra were found with bloodstains all around them but none underneath. He also noted anomalies involving items in the area of the attack not having blood splattered on them in a manner consistent with Brenda's account of the attack. The absence of cast off blood on the ceiling indicated that the murder weapon was relatively short and blunt, such as a one and one-half to two foot tire iron.

Associates of the office in which Marvin shared space testified they saw him working at his office at 9:30 p.m. on Tuesday, October 14th, the night before the tax return deadline. By 9:45 p.m. he was gone.[7]

Karen Palmer was romantically involved with Marvin after Brenda married Joe. According to her, they drove to Utah in a U-Haul truck on October 4th and returned October 10th. When police contacted her about Marvin's statement that they had made love in his new office, Palmer denied the claim. When she confronted

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7. The distance from the Santa Clara office to the Otto home is 13.6 miles; the distance from the DeRose Street house to the Otto house is 6.4 miles.

Marvin in jail about the remark, he explained "[i]t was the only thing he could think of to say at the time."

Police investigation focused on three vehicles Marvin used near the time of the murder. No blood was detected in the Mercury Monarch police established Marvin borrowed from D and M Motors on a Saturday sometime between the 9th and 14th of October 1986. The police searched Marvin's Cadillac and pickup truck on October 15th; both cars were dirty inside and out and did not appear to have been washed that day. At the time of Marvin's arrest, however, police found a car wash receipt on him, with a date of October 15, 1986, and an apparent time stamp of 9:33.[8/]

Neither Brenda nor Marvin testified.

John Orozco testified that midday Tuesday, October 14th, he saw Marvin with his car and suggested he go to a nearby tire service, apparently to replace a right rear hubcap on Marvin's car.

Sharon Ralston, a former girl friend of Marvin's testified she travelled from Portland during the second week of October 1986 and had sex with him on the rug in his new office on a Saturday night, during which Marvin scraped his knees. Ralston, unable to produce any documentation supporting her claim that she made the

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8. Russell DiSalvo testified that although he did not recall the exact time Marvin brought back the loaner car, he thought it was around 9 or 9:30 a.m.

trip, was unable to recall by what means she ot to the Bay Area from Portland.

Terri Haslouer testified that on October 14th she visited her parents on Thousand Oaks Drive, a relatively busy residential street several intersections from the Otto house. Fifteen minutes after her arrival and shortly before it got dark she noticed a medium-sized diesel truck cab with three Mexicans slowly drive by three times. Two days later, after hearing of the Otto murder, she called police to report her observations.

Loretta Tachovsky and her husband Dewey had been friends of Marvin for 15 years. Loretta, who was first contacted about this case over a year after Joe's murder, recalled that on October 14, 1986, Marvin called her about 5:30 p.m. She recalled the date because it was her cousin's birthday. In response to the call, she contacted her husband and told him Marvin needed help moving some furniture.

Dewey testified he left work at 9:30 p.m. on the evening of his wife's call and went to Marvin's place to help move furniture, arriving at approximately 10 p.m. When he arrived at the DeRose Street house, he found Marvin, who was wearing a white shirt, slacks, and wing tip shoes, operating a calculator at a table full of papers. Marvin continued working another five or ten minutes. They then spent 20 to 25 minutes moving a refrigerator from the back of the garage to the front. Dewey remained an additional 10 or 15 minutes, leaving as

Marvin, still in his white shirt and slacks, took his dog for a walk. Dewey thought he got home half-way through the 11 o'clock news.[9]

II

Tape Recordings from Wiretapped Telephone Line

The jury heard much evidence obtained through a voice-activated tape recorder Joe connected to the telephone line in his home. Defendants were aware Joe had attempted to tape calls but Brenda thought she had defeated such attempts; in the whispering tape, she mistakenly told Marvin, "I learned how to unplug it." Defendants contend Joe's surreptitious taping violated both state and federal law and that evidence of their taped conversations should have been excluded under the provisions of both. We disagree.

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9. Marvin's taped statement, given October 15th about his activities the previous evening, relates a different alibi. Marvin told Graves he had got home around 8:45 p.m. and spent the rest of the evening working in his house, doing chores such as putting away dishes and folding blankets. He did not mention working on any papers, moving furniture or a refrigerator in the garage, or ever seeing Dewey that night. Marvin also stated he wore a pair of Levis and a blue pull over shirt, not a white shirt and slacks as Dewey described a year and one-half after the events.

A. State Law

1. Penal Code Section 631

Penal Code section 631 proscribes, inter alia, the intentional and unauthorized interception of phone calls and the use of intercepted information and declares evidence so obtained to be inadmissible.[10/] While

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10. Section 631 provides in relevant part: "Any person who, by means of any machine, instrument, or contrivance, or in any other manner, intentionally taps, or makes any unauthorized connection, . . . or who uses, or attempts to use, in any manner, or for any purpose, or to communicate in any way, any information so obtained, or who aids, agrees with, employs, or conspires with any person or persons . . . is punishable by a fine not exceeding two thousand five hundred dollars ($2,500), or by imprisonment in the county jail not exceeding one year, or by imprisonment in the state prison, or by both a fine and imprisonment in the county jail or in the state prison.
. . . [¶] (b) This section shall not apply (1) to any public utility engaged in the business of providing communications services and facilities, or to the officers, employees or agents thereof, where the acts otherwise prohibited herein are for the purpose of construction, maintenance, conduct or operation of the services and facilities of such public utility, ... [¶] (c) Except as proof in an action or prosecution for violation of this section, no evidence obtained in violation of this section shall be admissible in any judicial, administrative,

defendants may be correct that Joe's interception of their phone calls violated section 631, Tavernetti v. Superior Court (1978) 22 Cal.3d 187, 194) we agree with the attorney general that article I, section 28, subdivision (d) of the California Constitution (hereafter section 28(d)), which provides, inter alia, that "relevant evidence shall not be excluded in any criminal proceeding," repealed the exclusionary rule in section 631 with regard to criminal proceedings.[11/] (See -People v. Ratekin (1989) 212 Cal.App.3d 1165, 1169; In re Lance W. (1985) 37 Cal.3d 873, 884-890; cf. People v. Meyer (1986) 183 Cal.App.3d 1150 [section 28(d) repealed exclusionary rule in Gov. Code, § 7489]; In re Demetrius A. (1989) 208 Cal.App.3d 1245 [section 28(d) repealed judicial exlusionary rules established in People v. Longwill (1975) 14 Cal.3d 943].) The California Wiretap Act "must be evaluated according

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legislative or other proceeding."

11. Section 28(d) provides: "Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, Sections 352, 782 or 1103. Nothing in this section shall affect any existing statutory or constitutional right of the press."

to federal law and evidentiary exclusions must be limited to violations of the fourth amendment." (Pennypacker, Reach Out and Bug Someone: California's New Wiretap Law (1989) 29 Santa Clara L.Rev. 275, 282; see § 629.22.)

Any argument that the Legislature's amendment and reenactment of section 631 in 1988 (see Stats. 1988, chs. 111 and 1373, §§ 3 and 5, nos. 3 and 12 West's Cal. Legis. Service) revived its exclusionary clause must fail. Section 28(d) provides in relevant part: "Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding . . . ." "This case does not involve a '. . . statute . . . enacted by a two-thirds vote of each house of the Legislature . . . . '" (People v. Ratekin, supra, 212 Cal.App.3d at p. 1169.)[12/]

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12. The Assembly has a membership of 80; the Senate a membership of 40. (Cal. Const., art. IV, § 2.) Section 631 was amended twice in 1988. In Statutes 1988, chapter 111, the Legislature amended the section by means of Senate Bill 1499. It was adopted in the Assembly by a 49 to 19 vote and in the Senate by a 31 to 3 vote. (Assem. Journal, p. 6819; Sen. Journal, p. 5847.) Section 631 was again amended in a cleanup bill, Senate Bill 83 (Stats. 1988, supra, ch. 1373). The final Assembly vote was 53 ayes and 18 noes. The Senate vote on Senate Bill 83 was 38 ayes and 0 noes. (Assem. Journal, Aug. 31, 1988, p. 10473; Sen. Final History, 1987-1988 Regular Session p. 78.) Neither legislative action 1988 dealing with section 631

Similarly without merit is defendants' argument that the recent holding in Taxpayers to Limit Campaign Spending v. Fair Pol. Practices Com. (1990) 51 Cal.3d 744 (Taxpayers v. FPPC "requires the conclusion that Proposition 8," of which section 28(d) was a part, "was rendered inoperative" because another measure known as Proposition 4 was approved by a higher number of affirmative votes at the same election. The court in Taxpayers v. FPPC held that "unless a contrary intent is apparent in the ballot measures, when two or more measures are competing initiatives, either because they are expressly offered as 'all-or-nothing' alternative or because

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constituted an enactment "by a two-thirds vote of the membership in each house of the Legislature" required under article I, section 28(d) of the California Constitution (Proposition 8) to avoid its Truth-in-Evidence provisions. Defendants' argument that "membership" means members present and voting rather than the full membership of each house is without merit. The Constitution does not require a simple "two-thirds vote" in this context; article I, section 28(d) carefully specifies "a two-thirds vote of the membership," and membership has been defined as the full 80 Assembly members and 40 Senators. (See e.g. Assem. Rule 105 (1989) and Sen. Rule 47 (1989); see also Mason's Manual of Legislative Procedure, §§ 510-512.) On the other hand, when a vote by "a majority of the members present" is required, the Legislative Rules specifically so state. (See e.g. Sen. rule 42 (1989.) This court grants respondent's motion for judicial notice filed October 5, 1990.

each creates a comprehensive regulatory scheme related to the same subject, [Cal. Const., art. II] section 10(b) mandates that only the provisions of the measure receiving the highest number of affirmative votes be enforced." (Id., at p. 747.) We are convinced that the decision announces a new rule which is not retroactive. In any event, the opinion does not apply to the limited type of conflict which existed between Proposition 8 and Proposition 4: "an initiative is inoperative in its entirety if the voters adopt, by a higher vote, an alternative comprehensive regulatory scheme governing the same subject. Our construction of section 10(b) does not foreclose operation of an initiative measure that receives an affirmative vote simply because one or more minor provisions happen to conflict with those of another initiative principally addressed to other aspects of the same general subject. . . . [I]f the principal purpose of the initiative can be accomplished notwithstanding the excision of its incidental bail provisions, the remainder of Proposition 8 can be given effect.

Consequently, we conclude that any violation of section 631 did not render inadmissible evidence so obtained.

2. Penal Code Section 632

In their opening and reply briefs, defendants jointly acknowledged that "the issue here is whether there

is any constitutional or other overreaching [sic] reason why the plain language of Penal Code Section 631(d) should not be applied to this case . . . ." They recognized that Joe's conduct violated Penal Code section 631's proscription against intentional unauthorized tapping of a telephone wire by a machine and relied upon their contention that Proposition 8 did not affect that statute since "the Legislature has reenacted Section 631 subsequent to the passage of Proposition 8." Nowhere in their extensive briefing of the wiretap issue did either counsel refer to section 632.[13/] However, once faced with

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13. Section 632 provides in pertinent part: "(a) Every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication, whether the communication is carried on among such parties in the presence of one another or by means of a telegraph, telephone or other device, except a radio, shall be punished by a fine not exceeding two thousand five hundred dollars ($2,500), or imprisonment in the county jail not exceeding one year or in the state prison, or by both that fine and imprisonment. If the person has previously been convicted of a violation of this section or Section 631, 632.5, or 636, the person shall be punished by a fine not exceeding ten thousand dollars ($10,000), by imprisonment in the county jail not exceeding one year or in the state prison, or by both that fine and imprisonment. . . . (d) except as proof in an action or prosecution for violation of this section, no evidence obtained as a result of eavesdropping upon or recording

this Court's recognition that section 631 was not reenacted by a two-thirds vote of the membership of each house of the Legislature after the effective date of Proposition 8, defendants in their supplemental briefing argue that Joe's conduct also violated section 632, subdivision (a)'s prohibition against eavesdropping upon and recording a confidential communication over the telephone and that the resulting tapes are inadmissible under the accompanying exclusionary provision in section 632, subdivision (d). They make this argument because unlike section 631, section 632 was amended via chapter 909 of the 1985 Statutes by a two-thirds vote of the membership of each house of the Legislature.

In discussing the differences between the state and federal regulations regarding wire and oral communications, the California Supreme Court, after noting that "[t]he state Invasion of Privacy Act (§§ 630-637.2) forbids wiretapping (§ 631), and electronic eavesdropping (§ 632) except by law enforcement officers . . . .," explained that "the scheme of the federal act is based on the type of communication, that is, whether it is wire or oral; the state act by contrast, on the type of surveillance, that is, whether it is wiretapping or eavesdropping. (Note (1969) 12 Cal.L.Rev. 1182, 1210.)"

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a confidential communication in violation of this section shall be admissible in any judicial, administrative, legislative, or other proceeding."

(People v. Conklin (1974) 57 Cal.3d 259, 263.) In People v. Ratekin, supra, 212 Cal.App.3d 1165 the court explained that although sections 631 and 632 "envision and describe the use of similar or the same equipment to intercept communications, the manner in which such equipment is used is clearly distinguished, separate and mutually exclusive. Section 631 prohibits 'wiretapping,' i.e., intercepting communications by an unauthorized connection to the transmission line. Section 632 prohibits 'eavesdropping,' i.e., the interception of communications by the use of equipment which is not connected to any transmission line." (Id. at p. 1168.)

We conclude that section 632 does not apply to the facts of this case, that the conduct of Joe "constituted 'wiretapping' as described in section 631 and did not constitute 'eavesdropping' as described in section 632." (Id., at p. 1169.)[14/]

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14. In any event, we are convinced that the reenactment of the exclusionary provision of section 632, subdivision (d) did not override the "Truth-in-Evidence" provision of section 28(d), as there is no evidence that the Legislature intended this effect. Section 632 was reenacted, with minor amendments but without substantial change, in 1985 as part of Senate Bill 1431 (Stats. 1985, ch. 909, § 2.5). The major focus of the legislation was to add section 632.5 dealing with cellular radio telephone interceptions, and section 632 was amended to conform to the new section. Although the Senate bill passed the assembly and the Senate by two-thirds of the full membership of each house, the

B. Federal Law

Defendants contend exclusion of the tape recordings is compelled by the Federal Wiretap Act, Title III of the Omnibus Crime Control and Safe Streets Acts of 1968 (18 U.S.C.A., §§ 2510 et seq., hereinafter Title III or the Act).

The exclusionary provision of Title III is contained in 18 United States Code Annotated section 2515: "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter."

Other applicable sections of Title III provide in

Legislature never addressed the exclusionary provision of the eavesdropping statute or the effect of Proposition 8 upon any reenactment of that provision. "We cannot assume that the Legislature understood or intended that such far-reaching consequences--virtually a legislative repeal of the 'Truth-in-Evidence' section of Proposition 8--would follow" the noncontroversial amendment of the eavesdropping statute to conform to the new Cellular Radio Telephone Privacy Act of 1985. (In re Lance W., supra, 37 Cal.3d 873, 894.)

pertinent part as follows:

United States Code annotated section 2510(4) defines "intercept" as "the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device."

United States Code Annotated section 2511 prohibits, inter alia, the intentional and unauthorized interception of telephone messages and the disclosure of their contents: "Except as otherwise specifically provided in this chapter any person -- . . . [¶] (a) willfully intercepts . . . any wire or oral communication; [or] . . . (c) willfully discloses . . . to any other person the contents of any wire . . . communication . . .; or (d) willfully uses . . . the contents of any wire . . . communication, knowing or having reason to know that the information was obtained through the interception of a wire . . . communication in violation of the subsection . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both."

However, "[i]t shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the constitution or laws of the United States or of any State or for the purpose of committing

any other injurious act." (18 U.S.C.A., § 2511(2)(d).)

United States Code Annotated section 2510(1) defines "wire communication" to mean "any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of original and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications."

A telephone conversation is a "wire communication" under the federal statute. (United States v. Axselle (10th Cir. 1979) 604 F.2d 1330, 1334, 18 U.S.C.A., § 2510(1).) Both defendants have standing to raise a Title III violation: the code specifically states that any "aggrieved person" means a person who was party to any intercepted wire, oral, or electronic communication or a person against whom the interception was directed. (18 U.S.C.A., § 2510, subd. (11); cf. People v. Medina (1987) 189 Cal.App.3d 39, 45-46.)

The question we face is whether disclosure of interceptions obtained as a result of Joe's connection of a voice-activated recording device to a telephone line in his mutually occupied marital home without the other spouse's knowledge or consent is in violation of Title III and, if so, whether exclusion of the content of conversations so recorded is required.

The People argue that the statutory exclusionary

rule contained in 18 United States Code Annotated section 2515 should not be imposed against the prosecution when it is the innocent recipient of an interception obtained in violation of 18 United States Code Annotated section 2511; in the alternative, they claim Title III does not apply to interspousal wiretaps of telephones within the family home.

1. **Wiretap of Family Phone**

Title III was designed in part to provide general protection for the privacy of wire and oral communications while "delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized." (Sen. Rep. No. 1097, 90th Cong. 2d Sess. 66 [Senate report which accompanied House Report 5037 (the predecessor to the Act)], reprinted in 1968 U.S. Code Cong. Admin. News at p. 2153.)

The federal circuit courts are split on whether Title III applies to a spouse's installation of a recording device on a telephone in their mutual home without the other spouse's knowledge or consent. The split involves the import of 18 United States Code Annotated section 2510(5)(a)(i), the family extension phone exception, which provides: "As used in this chapter -- . . . (5) 'electronic, mechanical, or other device' means any device or apparatus which can be used to intercept a wire, or oral

communication other than -- (a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or (ii) being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties. . . ." 15/

In Simpson v. Simpson, supra, 490 F.2d 803, the court held that a civil action for damages did not exist under Title III against a husband who wiretapped the family phone in order to intercept conversations between

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15. "The meaning of the phrase 'being used by the subscriber or user in the ordinary course of its business' becomes clear in light of objections to the original version, which did not contain this phrase. Prof. Herman Schwartz, appearing for the A.C.L.U., stated his fear that the original version would permit intruders or other unauthorized person to use extension phones without being subject to the prohibitions and penalties of the act. In the course of this objection, he made the following comment: [¶] 'I take it nobody wants to make it a crime for a father to listen in on his teenage daughter or some related problem. . . . But this bill does not go to that and goes beyond that.'" (Quoted in Simpson v. Simpson (5th Cir. 1974) 490 F.2d 803, 809, fn. 17, cert. denied, 419 U.S. 897; see also Anonymous v. Anonymous (2d Cir. 1977) 558 F.2d 677, 678-679.)

his wife and another man. After a "long, exhaustive and inconclusive" search of the Act's legislative history, the court determined Congress did not intend to establish a novel "federal remedy for persons aggrieved by the personal acts of their spouses within the marital home. . . ." (Id., at pp. 805-806.) Finding no "convincing distinction" between intercepting a family member's phone conversation by an extension phone in the family home, an "acceptable overhear" under section 2510(5)(a)(i), and wiretapping the family phone in order to intercept family member's conversations, the court concluded that "the (5)(a)(i) exemption is indicative of Congress's intention to abjure from deciding a very intimate question of familial relations, that of the extent of privacy family members may expect within the home vis-a-vis each other." (Id., at p. 809.) Aware that if appellant prevailed the husband could be subject to severe criminal penalties under Title III, the court in Simpson concluded it was "bound by the principle that criminal statutes must be strictly construed, to avoid ensnaring behavior that is not clearly proscribed. [Citation.]" (Ibid.) The court found this due process principle important in light of its "inability to determine from the statute and its legislative history whether one is prohibited from taping one's spouse's conversations within one's home." (Ibid.)

In Robinson v. Robinson La. Ct. App. (1986) 499 So.2d 152, 155, the court similarly classified Title III as a criminal statute and concluded that interspousal

surveillance "does not rise to the level of the criminal conduct proscribed by the federal statute."

In Anonymous v. Anonymous, supra, 558 F.2d 677, the court followed Simpson, declining to apply Title III to a husband's interception of telephone conversations between his wife and daughter. After noting that "'nobody wants to make it a crime' for a father to listen in on conversations between his wife and his eight year old daughter, from his own phone, in his own home," the court concluded "[t]he fact that appellee here taped the conversations which he permissibly overheard, we find, as the Fifth Circuit did in Simpson, 490 F.2d at 809, to be a distinction without a difference." (Id., at p. 679.)

Perfit v. Perfit (C.D. Cal. 1988) 693 F.Supp. 851, a federal district court in this state was persuaded by Simpson and Anonymous view that "it is unlikely that congress intended its regulations to extend to such personal acts conducted within the marital home," adding that '[a]pplication of federal law to an interspousal domestic conflict would run counter to the tradition of leaving such matters to the realm of state courts." (Id., at p. 856.) The court in Perfit similarly agreed with Simpson and Anonymous that the extension exception is "an expression of Congressional intent to exclude from Title III the interception of telephone conversations taking place within the marital home." (Ibid.) Other courts adopting the Simpson view include Baumrind v. Ewing (S. Carolina 1981) 279 S.E.2d 359, 360, cert. den. 454 U.S. 1092; Lizza

v. Lizza (E.D. N.Y. 1986) 631 F. Supp. 529, 533; and Remington v. Remington (E.D. PA 1975) 393 F. Supp. 898, 901; see also Stephens, All's Fair: No Remedy under Title III for Interspousal Surveillance (1989) 47 Fordham L. Rev. 1035.)

A number of other federal courts have adopted the opposing view that "'Title III prohibits all wiretapping activities unless specifically excepted. There is no express exception for instances of willful, unconsented to electronic surveillance between spouses. Nor is there any indication in the statutory language or in the legislative history that Congress intended to imply an exception to facts involving interspousal wiretapping.'" (Kempf v. Kempf (8th Cir. 1989) 868 F.2d 970, 973, quoting from Pritchard v. Pritchard (4th Cir. 1984) 732 F.2d 372, 374; see also United States v. Jones (6th Cir. 1976) 542 F.2d 661, 673; Heggy v. Heggy (W.D. Okl. 1988) 699 F.Supp. 1514, 1516; Kratz v. Kratz (ED Pa. 1979) 477 F.Supp. 463.)

We conclude the better view is represented by Simpson, Anonymous, and Perfit, which recognize that interspousal eavesdropping and phone tapping in the family home over family phones are beyond the purview of Title III. In discussing the crime they were planning over Brenda and Joe's home telephone, Marvin "impliedly accepted the risk that his conversation might be overheard on an extension and/or recorded. [Citations.]" United States v. Miller (1st Cir. 1983) 720 F.2d 227, 228; see also Rathbun v. United States (1957) 355 U.S. 107, 111.)

Evidence so obtained need not be excluded from a criminal prosecution pursuant to 18 United States Code Annotated section 2515. The evidence in the instant case was relevant and lawfully obtained through Joe's connection of a recording device on a phone line within his own home. We therefore hold it was not error for the trial court to refuse to suppress the recordings as to either defendant.

In light of our conclusion that Title III does not apply to Joe's wiretapping his own family phone, we need not address the People's alternative theory for the admissibility of the tapes.

III*/

Probable Cause to Arrest

Marvin contends the police arrested him without probable cause and that the statement he gave Sergeant Graves that evening should have been suppressed. Marvin concedes the police were not required to obtain an arrest warrant to arrest him outside of his house. (People v. Robertson (1982) 33 Cal.3d 21, 37.) Nor does Marvin quarrel with the proposition that Sergeant Grave's subjective state of mind as to whether an arrest rather than a detention occurred is not determinative on the

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*. See footnote, ante, page 1.

issue whether the ensuing arrest was legal. (Scott v. United States (1978) 436 U.S. 128, 138; People v. Fay (1986) 184 Cal.App.3d 882, 892.) Instead he contends "the facts known to the officer were not such as to lead a man of ordinary care and prudence to believe and conscientiously entertain an honest and strong suspicion that [he] was guilty of murder." We disagree.

Sergeant Graves arrived at the Otto house at 2:06 a.m. on October 15, 1986 to view the scene of Joe's murder. Marvin was arrested for that murder at 8:05 p.m. the same day. The evidence presented at the hearing to suppress evidence (§ 1538.5) which supported probable cause for that arrest was as follows:

After viewing the murder scene, Graves interviewed the Kennedys regarding Brenda appearing at their door naked and allegedly concerned about Joe's safety. The Kennedys, Joe's neighbors who coincidentally both work in law enforcement, explained that Brenda's displays of emotion did not seem genuine; she was very attentive and curious about police activities at the scene and when Kim Kennedy was on the phone to the dispatcher but became hysterical when attention was focused on her. Scott Kennedy told Graves of the tape he listened to at the request of Joe, who suspected his wife was involved with her former roommate "Mark" and that he was in danger. Kennedy told Graves the whispering voices on the tape, later identified as Brenda and Marvin, began with Brenda asking "why" followed by Marvin calling

her "baby," saying he had stood around for over an hour, and then listing several events which occurred that night near Joe's house such as a party and an accident which led him to think he might be seen. Brenda then said, "Baby I love you. I can't take this much longer. We have to do something." Marvin replied, "Well, I have got another plan." Joe told Kennedy he was positive Brenda and Marvin intended to kill him and mentioned that he suspected that $10,000 he had given Brenda for her daughters' education had gone elsewhere. Kennedy had felt Joe was targeted to be killed and had told him to go to the police.

Graves next interviewed Brenda who described the alleged burglary and attack and then provided some personal background information. While claiming no significant problems in the marriage, Brenda acknowledged she married Joe for reasons of security relating to her daughters' education and that Joe did not have long to live because of poor health.

Brenda told Graves that before the marriage she and Marvin had lived together as lovers at the DeRose Street house for one and a half years. She mentioned calling him to arrange a transfer of the utilities at DeRose to his name.

After a break in the interview, Graves asked Brenda whether she had ever discussed killing Joe on the phone. After an eight-second pause, she said, "[n]o, I don't think so." When Graves pressed her on the point,

she ultimately responded, "No, I don't remember." When Graves confronted her with the so-called "whispering tape," Brenda "responded in a very cold calculated fashion, and said, 'I want to see a lawyer.'" The interview ended and Brenda was placed under arrest.

Later that morning Graves interviewed Joe's daughter Jolynn who had been living with her father and Brenda. She told Graves she had heard the whispering tape and knew of her father's concern that Brenda and Marvin were going to kill him. Jolynn added that when she came home the Sunday morning following the whispering tape, the front door was unlocked although Joe said he locked it on going to bed. She added that Brenda had Joe remove their little bells attached to the door and did not like the alarm set.

Jolynn told Graves the night Joe was murdered, she tried to ensure his safety by telling Brenda she would be home early from her work; Brenda reacted by scowling, dropping something, and seeming upset by this news. Jolynn said her father felt Brenda was cheating on him, and that during the marriage Brenda was pressuring Joe to buy her an expensive home and furniture. Graves learned from Jolynn of a second tape Joe had found on Tuesday, hours before he was killed.

Graves next returned to the crime scene where he was struck with a number of anomalies which led him to suspect that the burglary and assault on Brenda had been staged, that Brenda was involved in the killing, and

that someone must have helped her. He based the latter conclusion on Kim Kennedy's statement that Brenda's hands were tightly bound behind her back, a circumstance requiring the assistance of a confederate; that Brenda was not physically capable of inflicting the injuries Joe had suffered; and that the whispering tape suggested particularly in light of Joe's murder, that a man was going to be lying in wait.[16/]

By 8 a.m. Graves learned that Brenda's purse with her credit cards and identification had been found intact near a fence which opens to let people in and out of a business. Graves believed someone intentionally left the purse to be found easily, which confirmed his earlier suspicions.

After Graves instructed other officers to bring Marvin to the police station, by arrest if necessary, he obtained a search warrant which authorized a search of Marvin's person, his house and cars, as well as including authority to take blood and hair samples, fingerprints, fingernail scrapings and any dust, lint or fibers from his person.[17/]

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16. According to Graves, the information from Jolynn regarding the unlocked door on Sunday morning similarly gave meaning to Marvin's apparent excuses on the whispering tape for not entering the house.

17. The police obtained the above-mentioned search warrant for Marvin's person and property based on basically the same facts available to Graves at the

Following Graves's instructions, officers took up positions outside Marvin's residence at 4 p.m. at 8:05 p.m. Marvin arrived in a blue Cadillac.[18] As he got out of the car police approached him with guns drawn. Marvin was handcuffed and placed on the ground. When the officers asked him to accompany them to the police station, he agreed; he rode to the station handcuffed.

The warrant was executed at 9:42 p.m. after Marvin was taken to the police station. The interview Marvin seeks to suppress began at 9:50 p.m.

The People correctly concede that Marvin was arrested outside his house. (See Dunaway v. New York (1979) 442 U.S. 200, 213-216.) "Cause for arrest exists when the facts known to the arresting officer 'would lead a man of ordinary care and prudence to believe and conscientiously entertain an honest and strong suspicion that the person is guilty of a crime.'" (People v. Harris (1975) 15 Cal.3d 384, 389.) Here Joe was killed under circumstances which suggested a staged burglary, and a taped conversation existed that strongly suggested his wife

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time of Marvin's arrest. The issuance of the warrant necessarily represented a judicial finding supporting probable cause to arrest. Marvin (See People v. Rosales (1987) 192 Cal.App.3d 759, 768; United States v. Fixen (9th Cir. 1986) 780 F.2d 1434, 1436.)

18. Scott Kennedy had told Graves that Joe had told him that the "Mark" on the tape drove a Cadillac as well as a brown pickup truck.

was conspiring with her apparent lover, Marvin, to commit some clandestine act in the area of the Otto house, an act which sounded like a murder to Scott Kennedy, a trained police officer, to the victim, and to his daughter. Given the totality of the circumstances (Illinois v. Gates (1983) 462 U.S. 213), a reasonable and prudent man would entertain an honest and strong suspicion that Marvin Mark was involved in Joe's death.

We conclude that officers had probable cause to arrest Marvin outside his home and that the trial court properly denied his motion to suppress evidence of his entire taped interview with Graves.

IV

Miranda Violation

Marvin next contends the trial court should have evidence of that portion of his statement to Graves that followed his invocation of his right to an attorney.

"'Whenever the State bears the burden of proof in a motion to suppress a statement that the defendant claims was obtained in violation of [Miranda v. Arizona (1966) 384 U.S. 436] the State need prove waiver only by a preponderance of the evidence. [Citations.]'" (People v. Markham (1989) 49 Cal.3d 63, 67, fn. 3.) The "'trial court's ruling on a Miranda issue may not be set aside . . . unless it is "palpably erroneous." A ruling palpably

erroneous is one lacking support of substantial evidence.'" (In re Eric J. (1979) 25 Cal.3d 522, 527.)

Before the interview started, Marvin waived his Miranda rights. However, less than halfway through the interview, when Graves confronted Marvin with the existence of the phone tapes, with Brenda's arrest, and with the fact she had implicated him, the following exchange took place:

"MARK: 'I doubt that very seriously.' [¶] Graves: 'I resent you calling me a liar. I booked her for murder myself.' [¶] MARK: 'I'm not calling you a liar.' [¶] Graves: 'The hell you're not. She is booked for murder and she implicated you in it. That's what I'm telling you.' [¶] MARK: 'I don't mean to call you a liar. I'm not saying that.' [¶] Harrison: 'She has been booked for murder and she is over in county jail and JOE is dead.' [¶] MARK: 'Is that right?' [¶] Harrison: 'That's why you are here and you have been implicated in the murder and there are telephone conversations.' [¶] MARK: 'Sure there is telephone conversations. I told you.' [¶] Harrison: 'I mean recorded conversations. I think you sort of suspected that.' [¶] MARK questioned: 'About what?' [¶] Graves: 'I realize she told you one of the conversations that she knows how to unplug the thing soit's not recorded. Remember you told her, "You shouldn't be calling me from your house. Oh, that's okay, I've learned how to unplug the machine." The only thing she didn't know was that there was a backup machine that

was on all the time.' [¶] MARK: 'Is that right?' [¶] Graves: 'That's right. Do you remember that conversation with her?' [¶] MARK: 'Yeah, I do." [¶] Graves: 'You told her she shouldn't be calling you. Why is that?' [¶] MARK: 'Why upset the apple cart.[']' [¶] Graves: 'You meet in a parking lot out there in the middle of nowhere, on the way to work but she can't call you?' [¶] MARK: 'It's broad daylight.' [¶] Graves: 'What's wrong with a phone call in broad daylight?' [¶] MARK: 'Why upset the apple cart? You know.' [¶] Graves: 'I don't understand that.' [¶] Harrison: 'There's more to it MARVIN.' Graves: 'You start remembering some of those conversations and you'll know there is more to it.' [¶] MARK: 'A lot more to what? I don't see?' [¶] Graves: 'Your implication to the murder and your involvement.' [¶] Harrison: 'We have been working the case since a little after midnight. We've talked to a lot of people. We have people listening to tapes of the conversations. Including your conversation with BRENDA. You are not being honest with us.' [¶] MARK: 'Well, you know. If you're [sic] actually acusing [sic] me of something I should probably get an attorney as something, right? I mean, I tried to give you the answers, I didn't think I needed an attorney for anything. What do I need an attorney for if I didn't do anything. Right?' [¶] Graves: 'I assumed you waived your rights and didn't want an attorney because you wanted to talk to us, I further assumed with the information we had that before

we even sat down with you in here you would do one of two things. You would lay your cards on the table or you would bullshit us. That's why I said you are not being honest.'"

The trial judge, recognizing the significance of "voice inflection and things like that" listened to the whole tape. He then determined Marvin had validly waived his Miranda rights and was not involving his right to an attorney during his last comments cited above, finding based on the total tape that "they were gently sparring with each other and vying for decision more than any invocation of any Miranda right. [¶] I think this defendant clearly understood his Miranda rights and he clearly understood what he could tell the officers and what he should not tell the officers."

"When an accused expresses a desire to deal with the police only through counsel, all further interrogation by the authorities must cease until counsel is present." (People v. Tyson (1988) 197 Cal.App.3d 1275, 1281.) The first question, however, is "whether the accused actually invoked his right to counsel," i.e., whether the accused "expressed his desire" for, or "clearly asserted" his right to assistance of counsel. (Smith v. Illinois (1984) 469 U.S. 91, 95.)

The mere mentioning of the word "attorney" does not render a statement an equivocal invocation of the right to counsel; there is a simply nothing "talismanic" about the word "attorney." (Bruni v. Lewis (9th Cir. 1988)

847 F.2d 561, 564; see also United States v. Jardina (5th Cir. 1984) 747 F.2d 945, 949.) In Tyson, for example, the defendant told the officer who had read him his Miranda rights that "he had spoken with his mother on the telephone and she said he might need an attorney. The officer responded that Tyson was an adult, that the arrest warrant was for him, and that it would have to be his decision whether he spoke with police." (People v. Tyson, supra, 197 Cal.App.3d at p. 1280.) After a pause, Tyson elected to proceed. Relying on Smith v. Illinois, the court held Tyson neither expressed his desire for, or clearly asserted, his right to assistance of counsel.

"'A desire to halt the interrogation may be indicated in a variety of ways,' and the words used by the suspect 'must be construed in context.' [Citation.]" (People v. Hayes (1985) 38 Cal.3d 780, 784-785.) In Hayes, the defendant admitted committing the offenses to the interrogating officer, who continued to elicit more details about the crimes. Defendants finally asked, "do I gotta still tell you after I admit it?" (Id., at p. 784.) The questioning continued, and the Supreme Court found no invocation, relying on one of its earlier decisions:

"More similar to the case at bar is In re Joe R., supra, 27 Cal.3d 496. There a minor suspected of committing robbery-murder was questioned after waiving his Miranda rights. At first he gave an exculpatory version of his involvement in the events; when the interrogating officer accused him of lying and produced inculpatory

evidence found at his house, the minor said, 'That's all I got to say' or 'That's all I want to tell you.' (Id., at p. 513.) The officer nevertheless continued the interrogation and the minor confessed to the robbery. The trial court found that in making the quoted remark the minor was not trying to stop the questioning but was simply reaffirming his prior story. On appeal, this court rejected the minor's contention that he had been denied his right to withdraw his Miranda waiver; viewing the remark in context, we held it was not unreasonable for the trial court to adopt the prosecution's view of the meaning of that remark, and thus to find no violation of the privilege against self-incrimination. (Id. at p. 516.) [¶] Here, too, the trial court could reasonably have endorsed the inference drawn by the interrogating officer--i.e., that taken in context defendant's remark meant that although he was willing to confess to the crimes he was uncomfortable about going into their details. Such reluctance is an understandable reaction to a confession of multiple robbery-murder, and does not rise to the level of an implied assertion of the defendant's constitutional right to cut off questioning." (People v. Hayes, supra, 38 Cal.3d at p. 786.)

In the instant case, Graves testified he understood Marvin's comments as "indicating to me he didn't need [an attorney]." Here, as in Hayes, "the trial court could reasonably have endorsed the inference drawn by the investigating officer . . . " (38 Cal.3d at p. 786.)

After reviewing the entire tape relied upon by the trial court, we find that, when viewed in context, Marvin's comments support the trial court's explicit determination that Marvin, a 52-year-old tax agent, was "gently sparring" with Graves rather than clearly asserting his desire to invoke his Fifth Amendment privilege to counsel, as well as its implicit finding that "defendant's statements were not even an equivocal assertion of the right to counsel, but only an explanation of why he was willing to proceed without counsel." (People v. Thompson (1990) 50 Cal.3d 134, 165; see also Griffin v. Superior Court (172) 26 Cal.App.3d 672, 699.)

Finally, there is no basis for Marvin's claim that the trial court used the wrong standard because it noted "I'm not . . . satisfied that that's [Marvin's comments] a clear indication of any Miranda right." The trial court expressly concluded that the entirety of Marvin's statements to Sergeant Graves were "freely and voluntarily given after and adequate and valid waiver of Miranda rights and I find this beyond a reasonable doubt." This statement more than satisfies the standard of proof that the prosecution bear its burden by the preponderance of the evidence; "we accept those statements which support the judgement as representing the court's final determinations, and interpret favorable to the judgment those statements which are susceptible of such interpretation." (People v. Gorshen (1959) 51 Cal.2d 716, 734, overruled on other grounds in People v. Wetmore

(1978) 22 Cal.3d 318, 324, fn. 5.)

V

Exclusion of Parts of Brenda's Taped Interview

Marvin contends he was prejudiced by the trial court's refusal to permit Brenda to play her entire taped police interview to the jury after the prosecution played two segments.

The first segment the jury heard concerned how Brenda met Joe, their relationship after the marriage, and reference to Joe's poor health. In this segment, Brenda is upset and heard crying. In the lengthy unplayed stretch of tape following this section, Brenda expounds on her version of how Joe was killed.[19] The second segment the jury heard followed this unplayed description. It began with Graves confronting Brenda regarding whether she ever discussed killing Joe over the phone. Brenda reacted with an eight-second pause and then said in a low voice, "No, I don't think so." When Graves pressed the question, Brenda said, "Not that I know of." The segment of the tape concludes with Brenda denying such a conversation existed, her mentioning that she did not like being

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19. Brenda also discussed activities on the days before the killing and gave some information about herself, Joe, Jolynn, and Marvin.

married, that it was a hard adjustment after being single so long, and references to a phone call to her former boyfriend Roy Fukumura.

Marvin claims admission of the unplayed portion of the tape was necessary to place in context Brenda's hesitation and equivocation to questions about whether she conspired to murder her husband, arguing that when Graves confronted Brenda with the question, the nature of the interview took a sudden turn "which was bound to be startling to Brenda and give her cause to be upset and pause." We address and reject each of Marvin's theories tendered to support admissibility of the entire statement.

Marvin first contends the entire statement was admissible for the non-hearsay purpose of showing Brenda's demeanor during the entire interview because, with the entire tape, the jury could have found Brenda's responses and change in voice "to be from the shock of the accusation following a long line of questions which gave no indication it was coming and a tone which had suggested information gathering rather than accusatory inquiry before the question."

The trial court implicitly found that the interview that preceded the accusatory question did not illuminate Brenda's response. After listening to the entire tape, it ruled defendants "can inquire as to material that is relevant that might help explain the portion admitted, and only to that portion. You can't go to the rest of the statement, because it's hearsay and irrelevant."

The trial court has "wide discretion" to determine whether evidence is relevant, i.e., tends to prove or disprove any disputed issue of fact that is of consequence to the determination of the action. (People v. Green (1980) 27 Cal.3d 1, 19, overruled on other grounds in People v. Hall (1986) 41 Cal.3d 826, 834, fn. 3; Evid. Code, § 210.) Here, the trial court did not abuse that discretion in determining that the unplayed section was not relevant to explain the way Brenda answered or failed to answer Graves's admittedly pointed questions about whether she had plotted to murder her husband. While a trial court may not arbitrarily separate verbal acts from accompanying physical acts (People v. Whitehead (1952) 113 Cal.App.2d 43, 49) that rule does not apply where those acts do not accompany one another, as the trial court properly determined here.

Marvin next relies upon Evidence Code section 1250[20] to argue the entire interview as admissible as

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20. Evidence Code section 1250 provides as follows:

"(a) Subject to section 1252, evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain or bodily health) is not made inadmissible by the hearsay rule when: [¶] (1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or [¶] (2) The evidence is offered to prove or explain acts or conduct of declarant. [¶] (b)

hearsay as a statement of Brenda's existing state of mind or to explain her conduct.

The question before the trial court was whether Brenda's audible emotional state during the unplayed portion of tape proved anything about her audible conduct during the second segment of tape played to the jury. The court's answer, after listening to the whole tape and considering the contest, was that it did not. After listening to the entire tape, we conclude that the trial court's determination was supported by the record and need not be disturbed on appeal.

Moreover, Evidence Code section 1250 is limited by section 1252, which provides: "Evidence of a statement is inadmissible under this article if the statement was made under circumstances such as to indicate its lack of trustworthiness." Taped interviews that an accused gives to the police which lack trustworthiness are excluded from the "state of mind" exception. (People v. Cruz (1968) 264 Cal.App.2d 350, 358.) The trial court had before it substantial evidence showing Brenda was implicated in the murder of her husband and that she had feigned both acts and emotions after that murder. In that context, her emotional display and demeanor during her taped interview within hours of the murder were inherently

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This section does not make admissible evidence of a statement of memory or belief to prove the fact remembered or believed."

untrustworthy.

Marvin next contends the entire tape was admissible under Evidence Code section 356.[21] Section 3356 is indisputably "'" subject to the qualification that the court may exclude those portions of the conversation not relevant to the items thereof which have been introduced.'" [Citations.]" (People v. Perry (1972) 7 CAl.3d 756, 787.) "'The rule is not applied mechanically to permit the whole of a transaction to come in without regard to its competency or relevancy . . .' [Citation.]" (People v. Williams (1975) 13 Cal.3d 559, 565.)

We conclude the trial court properly exercised its discretion in determining that to the extent the unplayed portion of the interview was not relevant to the played segment, defendant could not inquire into it.

Finally, Marvin contends Brenda's entire statement was admissible because Graves, in his taped interview with Marvin, which was played for the jury, told Marvin Brenda had implicated him in the murder; Marvin claims the jury needed to hear the entire tape to decide

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21. Evidence Code section 356 provides: "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence."

whether Brenda implicated him and to avoid inferring that something on the unplayed portion did implicate him.

The trial court heard testimony from Graves regarding this claim outside the presence of the jury. Graves explained the basis for his assertion that Brenda implicated Marvin as follows: "I believe the way she displayed to me, specifically to not having any conversation about killing her husband, was an outright lie on her part, thus, in my view, implicated him in the homicide." In rejecting defendant's request to play the entire tape on this ground, the court noted that '[t]he officer was asked the question how did Brenda implicate Marvin. He answered it in my view she implicated him by lying about the conversation, about not having a conversation. That portion of that interview was played for the Jury."

Defendants were free to cross-examine Graves on this point in front of the jury to clarify the basis of his statement to Marvin that Brenda had implicated him. Similarly, they were free to replay that section of Brenda's tape that Graves relied upon for his view. The remaining portion, however, was irrelevant to the issue.

We conclude the trial court did not err in determining that portions of Brenda's taped statement were inadmissible.

VI

Relevancy of Testimony Comparing Alleged Burglary with Others

Over defendants' relevancy objection, the trial court permitted Officer Parker, a 15-year veteran of hundreds of burglary investigations, to testify regarding what he typically observed at residence burglary scenes. His typical observations, which included evidence of entry, disarray, removal of the tools from the garage, and turning a male victim's pockets inside out, were offered to show, and were relevant to prove, that Joe was not the victim of a real burglary. Courts "generally approve the use of expert testimony of qualified law enforcement officers on the modus operandi of criminals engaging in various kinds of criminal activity." (1 Witkin, Cal. Evidence (1986), § 504, p. 477, and cases cited therein.) Defendants did not object that Parker was unqualified to testify on this subject which was relevant to an issue at trial. The testimony was properly received.

VII

Evidence of Joe's Will

Marvin contends the trial court erred in admitting Joe's will into evidence through Jolynn, who stated her father gave it to her on the last day of his life.

The will left all Joe's property to his daughter, bequeathing Brenda one dollar.[22] Marvin argues that because the prosecution could not show that Brenda knew of the will, it was irrelevant and created a highly inflammatory yet unsupported inference "that from the grave Joe was saying Brenda killed him."

Evidence at trial showed the marriage between Joe and Brenda was not going well. The will evidenced Joe's growing disenchantment with Brenda and the probability he might end the relationship before his death, thereby depriving Brenda of everything she sought to achieve by means of marrying him. The accelerating deterioration of Joe's tolerance for the marriage supports an inference that Brenda had a motive to murder Joe quickly. In addition, evidence of the will, which was written five or ten days after the marriage and a month before the homicide, reflects Joe's obvious disenchantment with the marriage and rebuts Brenda's statement to Graves that the marriage was "good . . . not a bad relationship." The evidence was relevant and properly admitted.

In any event, any error in admission of the will was harmless. The jury knew Joe thought Brenda was plotting to kill him because of the whispering tape and his

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22. The final line of the will, which was excised, stated Joe's desire that several people including Brenda and Marvin be investigated in the event of his death.

reaction to it. Jolynn had told him to keep a loaded gun nearby to protect himself from Brenda and Marvin -- advice Joe followed. Joe and Jolynn conceived a story about Jolynn returning home early to keep the suspected plotters off guard. The fact the jury also learned Joe disinherited Brenda shortly before his death could not have surprised the jury or prejudiced defendants.

VIII

Evidence of Brenda's "Poverty" Prior to Marrying Joe

Brenda contends the prosecutor improperly introduced character evidence regarding her "poverty" and conspicuous consumption of expensive beauty services and clothes to show she had a motive to kill her husband.

Evidence of a defendant's poverty "without more" is inadmissible to establish motive "because it is unfair to make poverty alone a ground of suspicion . . . . [Citation.]" (People v. Edelbacher (1989) 47 Cal.3d 983, 1024.) However, evidence of poverty or indebtedness is admissible under some circumstances. For example, in Edelbacher, the court held evidence that defendant owed the victim money and had other debts, some of which were in arrears, "had substantial relevance to show the motive for the murder of defendant's creditor, and this relevance clearly outweighed the risk of undue prejudice." (*Ibid.*)

The prosecutor here did not introduce evidence of Brenda's pre-marriage "poverty" to show, without more, that it was the motive for Brenda to murder Joe. The evidence tended to prove that, from Brenda's point of view, this marriage was no love match and was entered into for a practical, financial purpose, and that, if the marriage collapsed before Joe's death, Brenda would gain few of the economic benefits that motivated her to marry him.

"[E]vidence of defendant's financial situation at the time of the offense is admissible to show motive where circumstantial evidence is largely relied upon for conviction." (People v. Martin (1971) 17 Cal.App.3d 661, 668.) The evidence of Brenda's past spending habits and financial means "had substantial relevance to show the motive for the murder of defendant's [husband], and this relevance clearly outweighed the risk of undue prejudice." (People v. Edelbacher, supra, 47 Cal.3d at p. 1024.)

In any event, given the weight of the evidence at trial to support guilt, the effect of this evidence was trivial. It was not reasonably probable that absent this evidence defendants would have obtained a more favorable result. (People v. Watson (1956) 46 Cal.2d 818, 836.)

IX

Instructional Error

Defendants contend the trial court should have instructed the jury on the lesser included offenses of second degree murder and manslaughter. The contention is without merit.

The sole defense at trial was that defendants did not murder Joe, who they claimed was the victim of a burglar. Marvin's alibi defense had him moving a refrigerator in his garage and running his dogs at the time of the killing. Brenda's story was of being struck, stripped naked, and tied up by the killer. There was no evidence to indicate the killing was less than a planned, deliberate murder by either defendants or the murderous intruders Brenda described.

A trial court has no obligation to instruct on a lesser included offense "when there is no evidence that the offense was less than charged." (People v. Wickersham (1982) 32 Cal.3d 307, 323-324.) If the evidence shows that if defendant was guilty at all, he was guilty of the greater offense, an instruction on the lesser offense need not be given, even if requested. (Id. at pp. 323-326; see also People v. Lema (1987) 188 Cal.App.3d 1541, 1545.) Since the record in this case contains no evidence worthy of consideration supporting lesser included instructions on second degree murder or manslaughter, the trial court

properly rejected defendants' request for these instructions.

Marvin next contends that the trial court erroneously instructed the jury in the language of CALJIC No. 3.00[23] that he "could be guilty of murder as an aider and abettor if he aided the commission of some other crime the natural consequences of which were murder without giving supplemental instructions." (Capitalization omitted.) He claims his conviction should be reversed because the jury was instructed that an aider and abettor is not only liable for the "particular crime" contemplated but also for the natural consequences of any act that he knowingly and intentionally aided or encouraged. He argues that, because the court did not identify the particular act referred to in the instruction, a rational jury may not have understood that he was accused of contemplating and aiding and abetting in a murder. Rather, Marvin suggests, the jury may have convicted him of murder based on such acts as marital infidelity, fraud, or theft.

Marvin was accused of plotting with Brenda to

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23. CALJIC No. 3.00 provides as follows: "The persons concerned in the [commission] [or] [attempted commission] of a crime who are regarded by law as principals in the crime thus [committed] [or] [attempted] and equally guilty thereof include: ¶ 1. Those who directly and actively [commit] [or] [attempt to commit] the act constituting the crime, or [¶] 2. Those who aid and abet the [commission] [or] [attempted commission] of the crime."

murder Joe and, in fact, murdering him. The evidence, argument of the prosecutor, and the response of the defense was directed solely to that accusation. Marvin's suggestion that the charge was sufficiently subtle to elude the jurors' grasp is without merit.

In his reply brief, Marvin apparently abandons his contention that supplemental instructions were required, claiming instead that the instruction was "erroneous rather than incomplete." This contention can be summarily dismissed. The trial court was obligated to instruct the jury on aiding and abetting. If the instruction was incomplete or needed clarification, it was Marvin's responsibility to request additional or clarifying instructions. (People v. Bell (1989) 49 Cal.3d 502, 550; People v. Anderson (1966) 64 Cal.2d 633, 639.) In any event, it is assumed jurors are intelligent beings capable of understanding and correlating all instructions given to them. (People v. Billings (1981) 124 Cal.App.3d 422, 427-428, disapproved on other grounds in People v. Karis (1988) 46 Cal.3d 612, 642, fn. 22.) We interpret the instructions in light of the evidence adduced and conclude no rational jury could have been misled by the instruction on aiding and abetting in the manner Marvin suggests.

X

Evidence of Joe's Journal Entry Regarding Marvin's Threat

Marvin contends the trial court improperly admitted into evidence Joe's "date book" entry reflecting that on March 13, 1986, Marvin said over the telephone that he would "bury" Joe.[24]

The date book entry was introduced through Jolynn, who stated she was present with Joe in March 1986 when he had a phone conversation with Brenda and Marvin. Without objection Jolynn described Joe as pale and shaking when he got off the phone. Joe later told Jolynn "something to the effect that . . . Mark didn't want him following Brenda around or something like that, and that's why he stated to leave her alone or I'll bury you."

The trial judge found that when coupled with the above testimony, the date book entry appeared trustworthy and admissible on the issue of Joe's state of mind. Marvin argues Joe's state of mind in March 1986 was not relevant and that the entry was prejudicial unreliable hearsay.

A murder victim's journal entries, when properly

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24. The entry read: "Called 9:30, no answer. Called 11:30 store, hung up on me. Brenda called me at 4:10, don't see me, stay away from me hung up. I called and asked for 2-K. Mark called me. Will bury me."

authenticated, are admissible on the issue of his state of mind, if relevant. (See People v. Melton (1988) 44 Cal.3d 713, 739-740; Evid. Code, § 1250, subd. (a)(1).) Here, one possible motive for murdering Joe was defendants' concern about what Joe would do when he discovered the $10,000 check he gave Brenda for her daughters' education wound up in Marvin's business account. Evidence of the March 1986 date book entry was relevant to establish that Joe would not have countenanced Marvin getting the money to invest and, that if he found out, he would have been sufficiently upset to terminate the marriage and any financial benefit Brenda thought she would get from it. Having once threatened to "bury" Joe, Marvin was not the person Joe would knowingly allow to become the repository for his $10,000. Because Joe's state of mind was in issue as it involved his feelings about Marvin, the trial court's ruling was proper.

In any event, Jolynn's testimony about Marvin's "I'll bury you" remark was received without objection. In light of the admission of this evidence, any error in admitting the journal entry which contained similar words was harmless. (People v. Watson, supra, 46 Cal.2d at p. 836.)

XI

Exclusion of Documents Purportedly Related to Marvin's business

Marvin contends the trial court improperly excluded documents that would have rebutted the prosecutor's argument that he secretly handled the money received from Brenda. Marvin claims these documents, purportedly corporate business minutes of Mark Enterprise, would have shown the $10,000 check Brenda routed to him from Joe was handled in the normal course of his business, supporting an inference that "there was no 'laundering' of funds and nothing which was 'hidden or the like.'" Marvin's contention that these papers should have been admitted for the non-hearsay purpose of showing how he handled the matters identified therein is without merit.

In denying Marvin's request to introduce the purported minutes and documents from Mark Enterprises, the trial court found as follows: "These are not legal documents. These are what I perceive to be an attempt by the defendant Marvin Mark to somehow show credence to this business operation, an attempt to somehow perhaps comply with the Corporations Code in conducting minutes of the operation. They are really difficult to understand. They appear to me to be, in addition to the hearsay argument, which I agree with the prosecution, appear to

me to be completely irrelevant, and they appear to me to be confusing. I'm going to deny their admittance at this time."

We agree with the trial court that the records were inadmissible hearsay. Marvin's purpose in introducing them was to show the truth of the matters asserted in them; that is, that he handled the check as asserted therein.

Furthermore, the prosecutor never claimed the $10,000 check was "laundered." The cancelled check with the bank stamp, "Bank of America, for deposit only, Mark Enterprises," was admitted into evidence, establishing that the check had been processed through Marvin's normal business account. The prosecutor only argued that Joe did not intend the $10,000 to go to Marvin and that he would have taken action against Marvin and his wife had he found out. The purported business papers therefore were irrelevant to any issue in the case.

XII

Evidence of Third-Party Guilt

Marvin contends the trial court improperly prevented him from presenting evidence that Joe's killer might have been George Sanchez, the alleged "ski-mask rapist" associated with many sexual assaults and burglaries in the Santa Clara County area between 1985 and 1987.

We disagree.

At the hearing on the subject of the proposed evidence on third-party guilt, San Jose Police Officer Muyo, a member of the sexual assault unit working on the ski-mask rapist cases, testified as follows about the police reports of the cases which suggested a common perpetrator.

Since 1984 police had identified 35 similar offenses involving 36 victims assaulted in their homes or work places in the county as ski-mask rapist cases. Similarities centered around the suspect's description, his verbal "signatures," and the property taken from the victims.

The suspect was described as a muscular Hispanic or white male, 24-28 years old, 5 feet 10 inches to 6 feet with dark hair and eyes and medium colored skin. Although he had a faint but noticeable Spanish accent, neither he nor his accomplice, in two cases in 1987, ever spoke Spanish.[25/]

The ski-mask rapist had a "verbal signature"; he generally told victims he was not from the area, or that he needed money to get out of town or to return to some location. Regarding sex acts, his common expression was

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25. Only two of the 35 incidents involved two suspects. They occurred in March and May of 1987, a year after the Otto murder; the accomplice was described as 5 feet 9 inches to 5 feet 11 inches, weighing about 165-170 pounds.

"spread your legs."

In eight to ten cases, the ski-mask rapist demanded or took ATM cards, often using them immediately after the offense. He often took jewelry and cash. After suspect Sanchez was arrested, several hundred pieces of jewelry were found in his home; they appeared to serve the purpose of trophies or souvenirs of the crimes.

The victims were always women; no man was ever attacked. The police believed the ski-mask rapist engaged in extended surveillance of the crime location as the victims were almost always alone when he struck. Only the two ski-mask rapist's victims attacked at home were married, and in both cases, the husbands were not home at the time: "The ski-mask rapist, as far as we know, did not break into any homes where the husband was at home at the time. There were several other cases where . . . the victims were married, but these were women who were either attacked in the work place or outside as they were alone."

It was the ski-mask rapist's practice to "avoid confrontation." He would flee when he heard noise or the arrival of another person. In the over thirty cases in which he entered homes or businesses he "never assaulted a woman where a man was present at any time." Also characteristic of the ski-mask rapist was the absence of violence: "He was generally described by many of the victims as being gentle, as being very caring. In those

cases where he actually removed the clothing, he did so with a great deal of care[,] . . . shoes or clothes [were] found stacked or folded neatly together . . . ." He never tore off a victim's bra but did rip a nightgown up the front on a single occasion.

Although the ski-mask rapist usually carried a gun or sometimes a knife, he never used a weapon. In one case, when a victim grabbed the blade of the knife and cut herself, he reacted in his typical fashion: "He grabbed a towel, wrapped her hand up, and then apologized for hurting her, and then fled the area. [¶] None of the victims were shot, none of the victims were stabbed. None of the victims were brutally beaten about the face or body."[26] On several occasions he struck victims with an open hand, apparently to get their attention. When Sanchez, the suspected ski-mask rapist, was arrested, police found pellet or BB guns believed to be used in his attack, which are significantly lighter than real guns.

In no reported instance did he tie anything around a victim's neck, as Brenda described. "His pattern was to immobilize and restrict the vision of the victim, search the house for valuables and other people, and return to the victim . . . and then begin his sexual

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26. One victim reported that the ski-mask rapist choked her. That incident occurred in August 1985 and involved an attempt only.

offenses." After he restricted the victim's ability to see, he would bind her hands with anything he found in the house, including nylon stockings. The bindings were consistently described as being "very loose." He often left the bindings on the wrists. Nevertheless, the women victims described him as a "gentleman rapist." There was no indication he ever used the word "motherfucker," which Brenda described her assailant as using.

At the time of the Otto murder, the ski-mask rapist reportedly wore a ski mask, not a nylon mask as Brenda described.

After hearing the above evidence the trial court quashed the defense subpoenas of ski-mask rapist victims, explaining that many of the circumstances of similarity [nighttime burglary, assailant covering his face, no discernible point of entry, carrying a weapon, binding victim] he found between the Otto case and the ski-mask rapist cases "would be present in most cases in which the persons are invading homes or the privacy of other persons for commissions of sexual assaults."

The court went on to explain that "[t]he thing that bothered me in this case . . . is . . . there were a lot of things that were dissimilar. I could not, in my mind, attach a -- such a degree of direct or circumstantial evidence linking third persons to the actual perpetration of the criminality of the Otto case. And whatever relevance -- whatever evidence that might have been somewhat relevant, I attribute as being remotely relevant,

and because of that I am going to invoke the rule under 352 that although some of it may be relevant, most of it isn't, and the relevant portion is remote and the probative value is substantially outweighed by the risk of undue delay, prejudice and confusion pursuant to 352 of the Evidence Code."

The defense then purposed to instead call Officer Muyo to testify as an expert witness as to the ski-mask rapist crimes. The trial court similarly denied this request on Evidence Code section 352 grounds.

"To be admissible the third-party evidence need not show 'substantial proof of a probability' that the third person committed the act; it need only be capable of raising a reasonable doubt of defendant's guilt. At the same time, we do not require that any evidence, however remote, must be admitted to show a third party's possible culpability. As [the Supreme] court observed in Mendez [People v. Mendez (1924) 193 Cal.39, evidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt; there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (People v. Hall (1986) 41 Cal.3d 826, 833.) Even when evidence rises to the level of being capable of raising a reasonable doubt of defendant's guilt, the trial court still retains its authority under Evidence Code section 352 to exclude it if its probative value is substantially outweighed by the risk of

undue delay, prejudice, or confusion. (Id. at pp. 833-834.)

Other crimes evidence is probative in establishing a modus operandi "'only to the extent that distinctive "common marks" give logical force to the inference of identity.' [Citation.] . . . [T]he strength of the inference is dependent upon two factors: (1) the degree of distinctiveness of the shared marks; and (2) the number of minimally distinctive shared marks." (People v. Huber (1986) 181 Cal.App.3d 601, 621.)

Here there was a low degree of distinctiveness of the shared marks. The minimally distinctive shared marks were the following: unforced residential entries at night in which women were bound by a muscular Hispanic male whose face was covered. What was truly distinctive were the dissimilarities between the Otto case and the ski-mask rapist attacks. In the instant case, the offer of proof presented through Muyo's testimony established that the Otto murder was the type of crime the ski-mask rapist was not associated with. The ski-mask rapist never entered a structure when a man was present; he never intentionally caused serious bodily injury; his victims were always women. He never struck a victim with an object, intentionally drew blood, or killed. He never spoke Spanish or used obscenities for effect. He never carried a club, tire iron, two by four, or any other blunt instrument that could have caused the injuries to Joe's skull which the pathologist described. Nothing in the ski-mask rapist's modus operandi remotely suggests he was

inclined to the physical violence involved in this case. Furthermore, the ski-mask rapist's characteristic "verbal signatures" were absent in the instant case. Therefore, the significant direct and circumstantial evidence presented to the trial court did not link the ski-mask rapist to the actual perpetration of the murder of Joe Otto.

In any event, the trial court acted well within its discretion in excluding the evidence under Evidence Code section 352, evidence which required a mini-trial, either by direct testimony of the victims or by a detailed recital of the facts of each case by Officer Muyo, on 35 separate incidents. Given that the proffered evidence was remote, would have consumed undue time, and could have confused the issues, the court's exercise of discretion, which was well thought out and reasonable, will not be reversed on appeal. (People v. Jordan (1986) 42 Cal.3d 308, 316; People v. Stewart (1985) 171 Cal.App.3d 59, 65.)

We conclude that under either prong of the Hall test-probativeness or a Evidence Code section 352 analysis--the trial court's decision to exclude the proposed evidence of the ski-mask rapist cases was proper.

Marvin claims that application of Evidence Code section 352 to exclude admission of third-party culpability evidence violated his constitutional rights. Our Supreme Court has rejected this precise claim (People v. Hall, supra, 41 Cal.3d at p. 834-835; People v. Farmer (1989) 47 Cal.3d 888, 921) and its decisions are binding upon this court. (Auto Equity Sales, Inc. v. Superior Court (1962)

57 Cal.2d 450, 455.)

XIII

Disposition

The judgment as to each defendant is affirmed.

_____

Cottle, J.

WE CONCUR

_____

Agliano, P. J.

_____

Bamattre-Manoukian, J.

People v. Otto and Mark
H004612

CERTIFICATE OF SERVICE BY MAIL

STATE OF CALIFORNIA,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. _____
	)	
BRENDA SUE OTTO AND MARVIN ELMER MARK,	)	
	)	
Respondents.	)	
_____	)	

RONALD E. NIVER, a member of the Bar of the Supreme Court Of the United States, states:

That his business address is 455 Golden Gate Avenue, Suite 6200, in the City and County of San Francisco, State of California; that on September 22, 1992, he served a true copy of the attached Petition For Writ Of Certiorari To The Supreme Court Of California in the above-entitled matter on petitioner by placing same in envelope addressed as follows:

Laurence S. Smith
Attorney at Law
660 "J" St., Ste. 380
Sacramento, CA 95814

Mark L. Christiansen
Attorney at Law
P. O. Box 163269
Sacramento, CA 95816

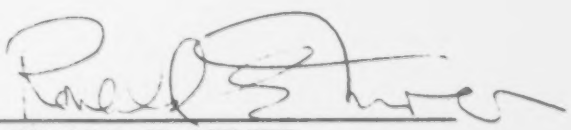
George Kennedy
District Attorney
County of Santa Clara
70 W. Hedding St.
San Jose, CA 95110

Santa Clara Superior Court
190 W. Hedding St.
San Jose, CA 95110

Sixth District Appellate Program
100 N. Winchester Blvd.
Ste. 310
Santa Clara, CA 95050

California Court of Appeal
Sixth Appellate District
333 W. Santa Clara St.
Ste. 1060
San Jose, CA 95113

Said envelope was then sealed and deposited in the United States Mail at San Francisco, California, with the postage thereon fully prepaid.



RONALD E. NIVER
Supervising Deputy Attorney General

92-525

No. 92 - 0000

Supreme Court, U.S.
FILED
SEP 30 1992
OFFICE OF THE CLERK

Supreme Court of the United States

October Term, 1992

CALIFORNIA

Petitioner

vs.

BRENDA SUE OTTO and MARVIN ELMER MARK

Respondent

Joint Response to Petition for Writ of Certiorari To the Supreme Court of California

MARK L. CHRISTIANSEN
P.O. Box 163269
Sacramento, CA. 95816
Telephone (916) 961-7330
Attorney for Respondent Mark

LAURANCE S. SMITH
660 "J" Street, Suite 380
Sacramento, California 95814
Telephone (916) 446-6615
Attorney for Respondent Otto

No. 92 - 525

Supreme Court of the United States

October Term, 1992

CALIFORNIA

Petitioner

vs.

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MARK L. CHRISTIANSEN
P.O. Box 163269
Sacramento, CA. 95816
Telephone (916) 961-7330
Attorney for Respondent Mark

LAURANCE S. SMITH
660 "J" Street, Suite 380
Sacramento, California 95814
Telephone (916) 446-6615
Attorney for Respondent Otto

QUESTIONS PRESENTED

Respondent feels that the questions presented by this case are most fairly stated as follows:

1. Should the exclusionary provisions of 18 U.S.C 2515 be read as creating an unrestricted "silver platter" upon which the government may receive information obtained by private citizens who have perpetrated unlawful wiretaps?

(a) May wiretaps concededly perpetrated in violation of a state law be admitted in a state trial consistent with 18 U.S.C. 2511(2)(d)?

(b) Does 18 U.S.C. 2515 allow a state prosecutor to lawfully republish in the public record the content of confidential telephone communications unlawfully wiretapped and recorded by a private citizen?

3. Is this case effectively moot due to parallel state law provisions which would compel the same result if the case were remanded?

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STATUTE INVOLVED

The statute involved in this case, in addition to those cited by Petitioner, is 18 U.S.C. 2511 (2)(d), which provides in pertinent part:

> "It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties has given consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the laws of the United States *or of any state*." *(Emphasis added.)*

I

THIS COURT HAS ALREADY DETERMINED THAT THERE IS NO "PRIVATE CITIZEN" EXCEPTION TO THE EXCLUSION OF WIRETAP EVIDENCE

Petitioner State of California makes it seem that this Court has decided in *United States v. Giordano* (1974) 416 U.S. 505 that there was no prohibition against admission of wiretap information provided by private citizens, and that the California Court ignored such a holding. (Pet'n pg. 10-11)

Giordano had absolutely nothing to do with activity by private parties. It dealt only with the Attorney General's ability to delegate his personal authority to seek judicial authorization for official wiretaps.

Holding that the statute had to be read literally in limiting wiretap authority to the Attorney General personally and to a single individual designated by him, *Giordano* thus stands for the broader proposition that Title III of the Omnibus Crime Control and Safe Streets Act of 1968 [1] is to be strictly construed in favor of privacy.

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[1] 18 U.S.C. 2510-2520.

United States v. Donovan (1977) 429 U.S. 413 is also cited as if synonymous with what *Giordano* has been misrepresented as standing for. (Pet'n pg. 11). It is not; *Donovan* also has nothing to do with private wiretaps.

Donovan holds that mere omission of the names of two parties overheard in a later report of a judicially-authorized tap as required by 18 U.S.C. 2518, subd. (1)(b)(iv) - an administrative oversight leading to no additional invasion of privacy - did not require suppression of the entire product of the tap. (See *Donovan*, supra at 434-435)

The state fails to also note that *Donovan did* expressly declare that the statutory exclusionary remedies prescribed in Title III are not dependent on or coextensive with the judicially-fashioned exclusionary rule applied to violations of the Fourth Amendment (429 U.S. at 434-435). The state's assertion that violations of Title III may be excused if "innocent" i.e., perpetrated by a private party, is precisely the kind of grafting of Fourth Amendment exclusionary rule doctrine onto Title III which *Donovan* foreclosed. [2]

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[2] See, e.g., *United States v. Jacobsen* (1984) 466 U.S. 109, 115-116 (Evidence found by employee of private express company not subject to Fourth Amendment). Not even the state court of appeal, which initially held in the state's favor, would accept the "innocent receipt of evidence" rationale. (See

As Justice O'Connor (writing as a state judge) has recognized in a case involving an operator's overhearing of conversations in which a wife conspired with another man to kill her husband, Title III's exclusionary rule far more stringent than any other such rule enforced by federal courts. (*State v. Dwyer* (AZ. App. 1978) 585 P. 2d 900, cited in Appendix "A" to pet'n pg. 39) [3]

Should the exception to that rule sought by California be granted, the floodgates to one of the most common - and pernicious - forms of invasion of privacy would be thrown open. As the 10th Circuit well put it in *Heggy v. Heggy* (10 Cir 1991) 944 F.2d 1537, [cert den. 3/23/92, __ U.S. __ [112 S.Ct. 1514]. [4]

Opinion of Court of Cal. Ct. of Appeal, Sixth App. Dist., Appendix "C" to Petn. at pg. 86)

[3] The state also suggests that there is a conflict among the circuits concerning admission of privately-perpetrated wiretaps, citing *United States v. Underhill* (6 Cir. 1987) 813 F.2d 105, 111-112 and *Traficant v. C.I.R.* (6 Cir 1989) 884 F.2d 258, 266 (Pet'n p. 10) *Underhill*, however, merely holds that a party to an illegal wiretap scheme can not claim to be an "aggrieved" person with standing to object under 18 U.S.C. 2518(10)(a). *Traficant* involved a recording by a party to the conversation.

[4] The state court of appeal cited and declined to follow the district court's opinion in this case, which the 10th Circuit affirmed. (*Heggy v. Heggy* (W.D. Okla. 1988) 699 F. Supp. 1514. See App. "C"

> "Professor Robert Blakey, generally credited as the architect of Title III, testified that 'private bugging in this country can be divided into two broad categories, commercial espionage and marital litigation. [ ] Senator Hruska . . . noted that '[a] broad prohibition is imposed on private use of electronic surveillance, particularly in domestic relations and industrial espionage situations.'
>
> "It is highly unlikely . . . that applying Title III to interspousal wiretapping will result in increased federal regulation of domestic relations. Rather, the more likely result is a decrease in interspousal wiretapping. [ ] " (944 F.2d at 1541, citations omitted.)

The issue here is as unavoidable as it is straightforward: Will confidential communications be kept private, or won't they be? This Court has clearly held that Title III is a "comprehensive scheme" for the protection of privacy, under which

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to pet'n p. 85) The California Supreme Court embraced the holding of the 10th Circuit. (Appendix. "A" to pet,n p. 23.)

"all interceptions of wire and oral communications are flatly prohibited" (*Gelbard v. United States* (1972) 408 U.S. 41, 46.)

Should Congress' guarantee of absolute privacy be riddled with the state's proposed exceptions for spouses and private parties who come up with something incriminating, the motivation to invade the privacy of the innocent as well as the guilty will become irresistible.

In that case, there will be no privacy for anyone.

II

FEDERAL LAW REQUIRES EXCLUSION OF WIRETAPS CARRIED OUT WITH INTENT TO VIOLATE A STATE LAW

The Federal exclusionary rule contained in 18 U.S.C. 2515 provides for exclusion from state proceedings of an interception of a wire communication which is carried out by a "party to the communication . . . for the purpose of any criminal or tortious act in violation of the constitution or laws of the United States *or any state*." (18 U.S.C. 2511 (2)(d). Emphasis added.)

Even if Joe Otto were deemed a party to the conversations in question - which not even the state claims he was - the publication of his recordings to third parties would still be subject to exclusion.

California State Law contains two provisions forbidding wiretapping and eavesdropping on

confidential communications, and also forbidding derivative use of improperly-obtained information. (Cal. Penal Code sections 631, 632.). [5] The California Attorney General has conceded below that these statutes were violated by the taping of the calls in question, merely claiming that their exclusionary provisions were rendered inoperative by

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[5] Section 631, part of Title 15 of the Penal Code, is declared in Cal. Penal Code section 630 to have been enacted to protect "the right of privacy of the People of this state". It provides in pertinent part,

> "Any person who, by means of any machine, instrument, contrivance, or in any other manner, intentionally taps . . . any telegraph or telephone wire . . . or who wilfully and without the consent of all parties to the communication, or in any unauthorized manner, reads, or attempts to read, or to learn the contents or meaning of any message . . . or communication while the same is in transit or passing over any such wire . . .*or who uses, or attempts to use, in any manner, or for any purpose, or to communicate in any way*, any information so obtained . . .is punishable by a fine not exceeding two thousand five-hundred dollars ($2,500.00), or by imprisonment in the county jail not exceeding one year, or in the state prison." (Emphasis added.)

Cal. Pen. Code section 632 forbids eavesdropping on both personal and wire communications in similar, overlapping terms.

a state initiative's "truth in evidence" provision. [6]

Neither the state Attorney General nor any of the courts below have addressed the effect of 18 U.S.C. 2511 (2)(d)'s incorporation of state laws into the exclusionary requirements of federal law.

Joe Otto's interceptions were clearly carried out for the purpose of publishing them. This intent is shown by the fact he played one of the tapes for his neighbor, Scott Kennedy, shortly after it was made. This act was itself criminally and civilly actionable under Cal. Penal Code sections 631 and 632. [7]

The recordings having been made with intent to violate state criminal and civil law, they are independently excludable under 18 U.S.C. 2511 (2)(d).

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[6] Cal. Const Art I, section 28(d). The state court of appeal, which did address state law issues directly, also concluded that section 631 was violated.

[7] As the result of the reading of the tapes into the public record, moreover, the tapes have also been aired on two national television programs, *Trial Watch* and *A Current Affair*. It is hard to imagine a more complete invasion of privacy than having one's telephone calls played on national television.

III

THE CALIFORNIA COURT WOULD REACH THE SAME RESULT UNDER STATE LAW.

The California Supreme Court did not expressly base its decision on independent state law grounds, a dangerous thing to do in California. [8] It nevertheless made it clear that were state law invoked - as it would have to be if the case were returned to it - the result would be the same.

In the first footnote to its opinion (App. "A" to petition, pg. 2), the California Court said, "

> "Although defendants relied exclusively on federal law at trial, the Court of Appeal also considered defendants' state law claims based on

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[8] See *Raven v. Deukmejian* (1990) 52 Cal.3d 336 [801 P.2d 1077], which held a 1990 ballot initiative's attempt to entirely eliminate independent state constitutional protection of individual rights invalid under the California Constitution.

> the California Privacy Act. (Pen. Code sections 631, 632.) State Law, however, can not be less protective than the federal act [ ] Because we conclude that suppression is required under Title III, we need not address the issues raised by the parties concerning California Law."

In that addressing those issues would have required the California Court to determine the constitutionality of a all or part of a state initiative constitutional amendment known as Proposition Eight [9], it is understandable that the California Court chose to restrict its discussion to the dispositive federal provisions contained in Title III.

The suggestion is nevertheless clear that were it forced to confront those issues, as it would be on any remand from this Court, the California Court would likely reach the same result on state grounds. This circumstance renders the instant case practically moot, and in any event unfit for a sweeping adjudication of federal issues which might be undercut in the end by the belated application of state law to the facts.

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[9] See discussion in opinion of court of appeal, Appendix "C" to pet'n ppg. 70-77.

CONCLUSION

Failing to present any issue worthy of review by this Court, the petition for writ of certiorari should be denied.

Respectfully Submitted,

MARK L. CHRISTIANSEN
LAURANCE S. SMITH

By:
LAURANCE S. SMITH

DECLARATION OF SERVICE BY MAIL

I, Laurance S. Smith, declare as follows:

I am over the age of 18 years, and not a party to the within action. My business address is 660 J Street, Ste 380, Sacramento, California 95814.

On September 25, 1992 I served the attached document on the following persons by placing a true copy thereof in an envelope addressed to each of them at their address(es) stated below, and by sealing and depositing said envelope in the United States Mail, at Sacramento, California with postage thereon fully prepaid. There is delivery service by United States Mail at each of the places so addressed.

SUPREME COURT OF CALIFORNIA
303 Second Street
S. Tower, 8th Floor
San Francisco, CA. 94107

Daniel E. Lungren
Attorney General of
the State of California
455 Golden Gate Ave. No. 6200
San Francisco, Californa 94102

George Kennedy
District Attorney
Santa Clara County
70 W. Hedding W. Wing 5th fl.
San Jose CA. 95110

Ms. Brenda Sue Otto
W-29365
EA-447L
Frontera, CA. 91720

Marvin Elmer Mark
D-87555
P.O. Box "W"
Reprisa, CA. 95671

Superior Court, St. of Claifornia
Santa Clara County
Attn: Read Ambler, Judge
191 N. First St.
San Jose, CA. 95113

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Sacramento, California September 25, 1992

LAURANCE S. SMITH